

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

- - - - -x

In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

January 30, 2014

10:05 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(CC: Doc# 5835) Fourth Fee Application of KPMG LLP, as Tax Compliance Professionals and Information Technology Advisors to the Debtors and Debtors in Possession, for Interim Allowance and Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred from May 1, 2013 through August 31, 2013

(CC: Doc# 1357) Final Hearing Re: Debtors' Motion for Entry of an Order Under Bankruptcy Code Section 363 and Bankruptcy Rule 6004 (I) Authorizing the Debtors to Compensate PricewaterhouseCoopers, LLP for Foreclosure Review Services in Furtherance of the Debtors' Compliance Obligations Under Federal Reserve Board Consent Order and (II) Reaffirming Relief Granting in the GA Servicing Order

(CC: Doc no. 1426) Final Hearing RE: Debtors' Application for an Order Under Section 327(e) of the Bankruptcy Code, Bankruptcy Rule 2014(a) and Local Rule 2014-1 Authorizing the Debtors to Employ and Retain Pepper Hamilton LLP as Special Foreclosure Review Counsel for Bankruptcy Issues to the Debtors, Nunc Pro Tunc to May 14, 2012, filed by Gary S. Lee on behalf of Residential Capital, LLC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(CC: Doc no. 1427) Final Hearing Re: Debtors' Application Under  
Section 327(e) of the Bankruptcy Code, Bankruptcy Rule 2014(a)  
and Local Rule 2014-1 for Authorization to Employ and Retain  
Hudson Cook, LLP as Special Counsel to the Debtors, Nunc Pro  
Tunc to May 14, 2012, filed by Gary S. Lee on behalf of  
Residential Capital, LLC

(Doc# 6172) Debtors' Motion for Entry of an Order Approving  
Payment of Success Fee to Debtors' Chief Restructuring Officer,  
Lewis Kruger

(Doc no. 4655) Motion to Allow Complaint to Determine Secured  
Status and Grant Release of Lien of GMAC Mortgage, LLC, filed  
by Nancy K. and Linton C. Layne

(CC: Doc# 4838) Adj. Hrg. RE: Debtors' Motion for Objection to  
Claim(s) Filed by Shane M. Haffey Against Residential Capital,  
LLC (Claim Nos. 2582 and 4402) Pursuant to Section 502(b) of  
the Bankruptcy Code and Bankruptcy Rule 3007

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(CC: Doc# 5163) Adj. Hrg. RE: Motion for Objection to  
Claim(s)/Debtors' Objection to Proofs of Claim Filed Against  
Residential Capital, LLC by (I) Ruth Assorgi (Claim No. 2580);  
(II) John R. Foster and Elizabeth Foster (Claim No 2582) and  
(III) Mark Moody and Sherrill Moody (Claim No. 2583) Pursuant  
to Section 502(b) of the Bankruptcy Code and Bankruptcy Rule  
3007

(CC: Doc# 5138) Adj. Hrg. RE: Motion for Omnibus Objection to  
Claim(s)/Debtors' Thirty-Sixth Omnibus Objection to Claims  
(Misclassified and Wrong Debtor Borrower Claims), going forward  
as to the claim of Rhonda Deese

(CC: Doc#5162) Adj. Hrg. Re: Motion for Omnibus Objection to  
Claim(s)/Debtors' Fiftieth Omnibus Objection to Claims (No  
Liability Borrower Claims - Books and Records)

(Doc# 5646) Motion for Omnibus Objection to Claim(s)/Debtors'  
Fifty-First Omnibus Objection to Claims (Borrower Books and  
Records Claims - Res Judicata and Wrong Debtor), relating to  
claims filed by Jamie L. Gindele

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(Doc# 6108) Motion for Omnibus Objection to Claim(s)/Debtors'  
Fifty-Seventh Omnibus Objection to Claims ((A) Redesignate,  
Reclassify, Reduce and Allow Claims; (B) Reclassify Claims; (C)  
Redesignate and Allow Claims; and (D) Redesignate, Reduce and  
Allow Claims)

Transcribed by: Esther Accardi  
eScribers, LLC  
700 West 192nd Street, Suite #607  
New York, NY 10040  
(973)406-2250  
operations@escribers.net

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S :

MORRISON & FOERSTER LLP

Attorneys for The Post-Effective Date Debtors, The ResCap  
Liquidating Trust and The ResCap Borrower Claims Trust  
1290 Avenue of the Americas  
New York, NY 10104

BY: LORENZO MARINUZZI, ESQ.  
MELISSA A. HAGER, ESQ.  
ERICA J. RICHARDS, ESQ.  
NORMAN S. ROSENBAUM, ESQ.  
JORDAN A. WISHNEW, ESQ.

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Attorneys for Official Committee of Unsecured Creditors  
1177 Avenue of the Americas  
New York, NY 10036

BY: JOSEPH A. SHIFER, ESQ.  
RACHAEL RINGER, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MCKEEVER LAW OFFICE, PLLC

Attorneys for Claimants Shane M. Haffey, and Mark and  
Sherrill Moody, John and Elizabeth Foster, and Ruth  
Assorgi  
P.O. Box 1181  
Isle of Palms, SC 29451

BY: HEATHER BOONE MCKEEVER, ESQ. (TELEPHONICALLY)

POLSINELLI LLP

Attorneys for ResCap Borrowers Claims Trust  
900 Third Avenue  
21st Floor  
New York, NY 10022

BY: DAN FLANIGAN, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DEPARTMENT OF JUSTICE

Office of the United States Trustee

201 Varick Street

Suite 1006

New York, NY 10014

BY: MICHAEL T. DRISCOLL, ESQ.

BRIAN S. MASUMOTO, ESQ. (TELEPHONICALLY)

ALSO APPEARING:

WILLIAM NOLAN, FTI Consulting, Inc. (TELEPHONICALLY)

PAMELA WEST, Residential Capital, Independent Director  
(TELEPHONICALLY)

JOHN DEMPSEY, Mercer USA (TELEPHONICALLY)

ARNO I. IZUAGIE, KPMG LLC (TELEPHONICALLY)

RHONDA DEESE, IN PROPRIA PERSONA (TELEPHONICALLY)

JAMIE AND GARY D. GINDELE, IN PROPRIA PERSONA (TELEPHONICALLY)

NANCY K. LAYNE (TELEPHONICALLY)



1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. We're here  
3 in Residential Capital, number 12-12020.

4 Mr. Marinuzzi?

5 MR. MARINUZZI: Good morning, Your Honor. For the  
6 record, Lorenzo Marinuzzi, Morrison & Foerster, on behalf of  
7 the reorganized debtors.

8 Your Honor, we're going to begin today on page 3 of  
9 the agenda, item number 2, the fourth fee application of KPMG.  
10 And the amended agenda is partly correct, partly incorrect.  
11 It's true that the matter has been resolved as reflected in the  
12 amended agenda but, Your Honor, I imagine, with an interim  
13 hearing, the Court will want to have a hearing on it. I do  
14 note that the U.S. Trustee, which had filed an objection, has  
15 agreed to withdraw the objection. And the fees originally  
16 requested in the amount of 91,133, based on the information  
17 provided to the U.S. Trustee and the withdrawal of objection,  
18 is in fact the amount that they're seeking.

19 I understand representatives of KPMG are on the phone,  
20 if the Court has any questions.

21 THE COURT: All right. And I gather there was some  
22 confusion as to whether the matter was going forward today.

23 MR. MARINUZZI: Correct.

24 THE COURT: The Court prepared on it, so --

25 MR. MARINUZZI: Okay.

1 THE COURT: Mr. Driscoll or Mr. Masumoto, do you want  
2 to address the issue?

3 MR. DRISCOLL: Yes, Your Honor. Subsequent to the  
4 December hearing, KPMG sent us over records supporting their  
5 time entries. At issue for the U.S. Trustee were certain  
6 duplicate time entries. So they've provided us with  
7 substantiating information to support that they actually worked  
8 those hours, so as a result, Your Honor, we've withdrawn our  
9 objection.

10 THE COURT: All right. Does anyone else wish to be  
11 heard with respect to the KPMG fee application?

12 All right, it's approved.

13 MR. MARINUZZI: Thank you, Your Honor.

14 THE COURT: And it is an interim fee application --

15 MR. MARINUZZI: Right. Correct.

16 THE COURT: -- just to make that clear.

17 MR. MARINUZZI: Your Honor, that brings us to page 8  
18 of the agenda, under Contested Matters, and the eight, or so,  
19 pages' worth of ink on the foreclosure review related,  
20 professional-employment orders. And I'm happy to report, Your  
21 Honor, as I've been promising to do for quite some time now,  
22 we've actually managed to circulate and get sign-off on final  
23 orders for PwC, Hudson Cook and Pepper Hamilton. For Hudson  
24 Cook and Pepper Hamilton, it's pretty simple because those were  
25 327(e) retention orders and we've converted them from interim

1 to final.

2 PwC was a bit more complicated because from the time  
3 we entered the initial interim order way back when, we've had a  
4 settlement of the foreclosure review, we've had an amended FRB  
5 consent order, and we've had a new engagement letter to cover  
6 the waterfall placement for the settlement with the FRB. And  
7 so the changes to the PwC order are a bit more material. I  
8 have marked copies that reflect changes from the sixteenth  
9 interim, if Your Honor would like to review them.

10 THE COURT: I was given copies yesterday; these are  
11 not blackline. But I was given copies of the three orders.  
12 Have they changed since yesterday?

13 MR. MARINUZZI: Since yesterday, they have not.

14 THE COURT: So I've reviewed all three.

15 MR. MARINUZZI: Okay, Your Honor. We would ask that  
16 they be entered on a final basis, and we'll save some ink on  
17 the next agenda.

18 THE COURT: Okay, Mr. Driscoll or Mr. Masumoto, do you  
19 want to address --

20 MR. DRISCOLL: Your Honor, we have no objection to the  
21 entry of the final orders.

22 THE COURT: Okay, so those three orders, ones for  
23 PricewaterhouseCoopers, ones for Hudson Cook, and ones for  
24 Pepper Hamilton, those are all approved.

25 MR. MARINUZZI: Thank you, Your Honor. That brings us

1 to page 17 of the agenda, item number 4 under Contested  
2 Matters, and that is the debtors' application for order  
3 approving payment of success fee to the debtors' chief  
4 restructuring officer, Lewis Kruger. Mr. Kruger is seated  
5 behind me. And on the phone today we have three declarants,  
6 Your Honor. The U.S. Trustee indicated that they didn't intend  
7 to cross-examine.

8 And thank you.

9 And Your Honor, with the Court's permission, has  
10 allowed them to participate telephonically; so they're  
11 available for any questions --

12 THE COURT: Okay.

13 MR. MARINUZZI: -- the Court might have.

14 By the motion, Your Honor, the debtors seek approval  
15 of payment of a two million dollar success fee to Mr. Kruger.  
16 As we note in the motion, the amount was actually wired to  
17 Mr. Kruger's bank account on the effective date of the plan,  
18 December 17, 2013. He hasn't touched it and will not touch it  
19 until he obtains a further order of this Court authorizing him  
20 to do so.

21 In part because the --

22 THE COURT: Tempting as it must be.

23 MR. MARINUZZI: I'm sorry? As tempting as -- I hope  
24 he does use it to go --

25 THE COURT: Stare at your bank statement.

1 MR. MARINUZZI: Hope he goes someplace warm with it.

2 Your Honor, in part because the money is sitting  
3 there, and also in large part because the success fee  
4 represents two-thirds of his compensation, we'd actually like  
5 to proceed today on this application rather than wait until the  
6 final fee applications are heard.

7 THE COURT: Yeah, and I know the U.S. Trustee, in  
8 their opposition, one of the things they asked was that the  
9 hearing on the motion to approve the success fee be adjourned  
10 till the final fee applications of all other professionals.  
11 And so that aspect of the objection's overruled; we're going to  
12 go forward today.

13 MR. MARINUZZI: Thank you, Your Honor.

14 THE COURT: Originally this was noticed for hearing,  
15 what I think was January 7th.

16 MR. MARINUZZI: I believe that's correct, Your Honor.

17 THE COURT: And because of the Court's scheduling, it  
18 was adjourned till today, January 30th. And certainly while  
19 the U.S. Trustee had to, and did, file its objection not just  
20 to the timing but also as to the substance of it, and did so,  
21 and it is the only objection that was filed, the Court's  
22 satisfied that the parties-in-interest, including the U.S.  
23 Trustee -- and I'll hear Mr. Driscoll or Mr. Masumoto today  
24 with anything else they want to add -- have had sufficient time  
25 to address the issues. So we're going to go forward today.

1 MR. MARINUZZI: Okay. Thank you, Your Honor.

2 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

3 MR. MARINUZZI: In support of the motion, the  
4 reorganized debtors offer: the declarations of former board  
5 member Pamela West, which was filed with the Court originally  
6 on September 27, 2013 as docket number 5228; the declaration of  
7 John Dempsey of Mercer, which was also filed on that date, as  
8 docket number 5229; and the declaration of William Nolan of FTI  
9 filed also on September 27th, as docket number 5230. Those  
10 declarations are also exhibits to this instant motion, so --

11 THE COURT: All right. Do you want to offer those in  
12 evidence?

13 MR. MARINUZZI: Yes, Your Honor, I'd like to offer  
14 them into evidence.

15 THE COURT: Any objection?

16 MR. DRISCOLL: No, Your Honor.

17 THE COURT: All right, so the declarations of Pamela  
18 West, ECF 5228, John Dempsey, 5229, and William Nolan, 5230,  
19 are admitted into evidence for purposes of the hearing.

20 (Declaration of Pamela West, docket #5228 was hereby received  
21 into evidence as a Debtors' Exhibit, as of this date.)

22 (Declaration of John Dempsey, docket #5229 was hereby received  
23 into evidence as a Debtors' Exhibit, as of this date.)

24 (Declaration of William Nolan, docket #5230 was hereby received  
25 into evidence as a Debtors' Exhibit 1, as of this date.)

1 MR. MARINUZZI: Thank you, Your Honor. And Your Honor  
2 may recall that those declarations were originally submitted in  
3 support of a prior motion heard on October 9 seeking to amend  
4 Mr. Kruger's engagement letter to provide for the success fee.  
5 And to complete the picture, Your Honor, the debtors filed a  
6 reply to the U.S. Trustee's objection last Friday as docket  
7 number 6350.

8 Your Honor, I would like to briefly review why  
9 Mr. Kruger was selected to serve as the CRO in his  
10 accomplishments, then I'd like to discuss the evidence, and  
11 then I'd like to discuss the U.S. Trustee's objection and why  
12 the evidence doesn't support it.

13 So let's rewind to a point roughly a year before the  
14 commencement of the plan confirmation hearing. And we were  
15 before the Court, seeking approval of an auction sale -- the  
16 results of the auction. And the six months in the bankruptcy  
17 case leading up to that point -- and frankly, for months before  
18 then -- the focus of the company and its board and its  
19 professionals and its management was to ensure that we had the  
20 most value for the assets as part of the going-concern sale.  
21 And that was the priority.

22 And during this period, there were a number of  
23 significant activities that were happening all around the  
24 company's operations, not the least of which was the examiner's  
25 investigation, the committee's investigation, wrangling over

1 the FRB foreclosure process. There were a lot of potential  
2 distractions, and I think it was very important for the company  
3 to focus on maximizing value and keeping the company going the  
4 way it was going through a sale closing. And a credit to all  
5 parties involved: nobody cut their noses off to spite their  
6 face, and we got to a successful sale process.

7 Now, as successful as that process was, we still  
8 needed to figure out how to distribute the value and how to do  
9 so under a plan that enjoyed support from creditors and was  
10 appropriate and confirmable under the applicable standards,  
11 including third-party releases, which we know are not always  
12 easy to obtain. And all roads -- or almost all roads led to  
13 AFI. And the principle question was, how could we negotiate a  
14 settlement with AFI that provided enough value that would buy  
15 enough support for a plan that enjoyed this popularity that we  
16 saw?

17 Now, to this day, I believe the board acted  
18 appropriately in focusing on the sale process. And it was a  
19 challenge to continue operating this company in a regulated  
20 industry during a bankruptcy case, and they succeeded in doing  
21 that. Having said that, it's understandable that third  
22 parties, in trying to negotiate with the debtors regarding  
23 claims against AFI, might have a sense of -- might prefer to  
24 negotiate with someone other than board members that approved  
25 the transactions that are the subject of the investigation,



1 approved a 750 million dollar settlement at the inception of  
2 the case, or were involved in the transactions that were the  
3 subject of the investigation. The board understood that.

4 And so what the board sought to do was to find a CRO,  
5 and a CRO who could speak for the debtors' estates in  
6 connection with these negotiations. And ultimately, after  
7 vetting a number of qualified candidates, the board selected  
8 Mr. Kruger in February of 2013. And they selected Mr. Kruger  
9 because of his qualifications: he clearly knows the law, he  
10 understands the important facts, and he was in a position to  
11 evaluate the claims that could be asserted by the debtors  
12 against AFI, claims that third parties could assert against  
13 AFI, and the claims that creditors could assert against one  
14 another with respect to the priority of their claims against  
15 the debtors' estates. These were all the things that were most  
16 relevant to the parties at the time. He also was free from  
17 conflicts. He didn't work for the debtors, didn't represent  
18 the debtors, had no connection to AFI, had no connection to the  
19 transactions. He could speak, and speak freely. He was the  
20 right person.

21 And when he was appointed in February, had a steep  
22 learning curve. But he got up to speed quickly. And at the  
23 hearing on October 9th, committee counsel commended Mr. Kruger  
24 for not only getting up to speed quickly, but getting up to  
25 speed in a way that didn't disrupt the process, because he

1 started while the mediation was already beginning. He immersed  
2 himself in that mediation.

3 THE COURT: I think I approved Mr. Kruger's retention  
4 and the appointment of Judge Peck as the mediator; I think that  
5 was at the same hearing, wasn't it?

6 MR. MARINUZZI: Your Honor --

7 THE COURT: Am I mistaken on that?

8 MR. MARINUZZI: -- the mediation order was entered, I  
9 believe, in December, and Mr. Kruger's order was entered in  
10 March, effective as of --

11 THE COURT: Okay.

12 MR. MARINUZZI: -- February 7th.

13 THE COURT: All right.

14 MR. MARINUZZI: So Mr. Kruger was able to do something  
15 that no one else on behalf of the debtors could do up until  
16 that point in time: he was able to bring credibility to the  
17 debtors' estates in these negotiations with AFI and the  
18 stakeholders. And he was very vital to the mediation; and it's  
19 not just the mediation. And the mediation, as Your Honor knows  
20 from the plan support agreement that came out of that mediation  
21 with its seventeen schedules, resolved a number of complicated  
22 issues; it was not easy.

23 But Mr. Kruger also participated in the FRB  
24 settlement, in the FGIC settlement, in getting creditor support  
25 for the plan, and also in overseeing the management operations

1 of the company after Mr. Bronno (ph.) left in May of 2013.

2 I don't think the U.S. Trustee takes any issue with  
3 his accomplishments, and we've seen his accomplishments;  
4 they're cited in other motions.

5 Now, unlike most CRO candidates who have agreements at  
6 the inception of the case, or at least have success fees set  
7 forth in letter agreements when they're retained, Mr. Kruger's  
8 engagement letter did not have a success fee set forth; it  
9 simply said that there will be a success fee. And the board  
10 didn't fill in a blank, and Mr. Kruger didn't insist on a  
11 number, because the board and Mr. Kruger believed it was  
12 appropriate to negotiate that number with the parties that  
13 would be paying it: the creditors.

14 To Mr. Kruger's credit, those negotiations -- they  
15 started, stopped, and ultimately it took some time before they  
16 resumed again. But at no point in time did Mr. Kruger stop  
17 working as hard as he was working. At no point in time did he  
18 focus on the success fee at the expense of everything else that  
19 he was hired to do. He was the consummate professional.

20 And by the time we sat down in September and the board  
21 ultimately said it's time to get a success fee approved for  
22 Mr. Kruger, we had the benefit of twenty-twenty hindsight; it  
23 was months after the logjam that existed when he was initially  
24 appointed had cleared. The plan was out, ready for acceptance,  
25 supported by many, many creditors. Mediation was largely

1 concluded. I mean, we had the benefit --

2 THE COURT: When you say "mediation was largely  
3 concluded," I think there was one minor dispute that remained.

4 MR. MARINUZZI: Well, "largely" -- that's why I said  
5 "largely", Your Honor. And ultimately we got that resolved --  
6 we had that resolved before Your Honor had to rule. But the  
7 act of putting together the plan term sheet with the support of  
8 ninety percent of the unsecured creditors at least, that was  
9 largely concluded.

10 THE COURT: So that we have a clear record -- I'm  
11 speaking somewhat euphemistically, but that minor dispute was  
12 with the junior secured noteholders, which resulted in two  
13 trials, one very lengthy decision. And finally just before  
14 closing argument, after the contested confirmation hearing, a  
15 phase-two trial, the resumption of the mediation resulted in  
16 the successful conclusion and the largely consensual plan. So  
17 my somewhat flippant comment about the minor dispute shouldn't  
18 be misinterpreted. It was obviously a very major dispute that  
19 existed throughout Mr. Kruger's tenure as CRO.

20 Go ahead.

21 MR. MARINUZZI: Thank you, Your Honor.

22 And so in September of 2013, the board asked for  
23 advice from its professionals on an appropriate success fee.  
24 The debtors again engaged the committee in these discussions,  
25 shared the materials put together by their professionals with

1 the committee, and negotiated an amount that was supported by  
2 the committee, and that was important to the board; also  
3 clearly agreeable to Mr. Kruger, which was also very important.

4 Now, the evidence. As part of the debtors' motion to  
5 amend Mr. Kruger's engagement letter, the debtors submitted the  
6 declarations of Pamela West, Bill Nolan and John Dempsey. And  
7 what Ms. West's declaration tells us is that the board acted in  
8 an informed manner in appropriately exercising its fiduciary  
9 duties in approving the proposed success fee. She testified  
10 that the board considered a number of factors in determining  
11 the proposed success fee, including: the benefits provided to  
12 the debtors' estates, through Mr. Kruger's services; the  
13 board's view that he undertook activities of a CEO; the support  
14 from the creditors' committee, which was vitally important; and  
15 the advice of the debtors' advisors.

16 The declarations of Mr. Dempsey and Mr. Nolan, both of  
17 whom provided advice to the board in connection with its  
18 determination to approve a two million dollar success fee,  
19 demonstrate that the two million dollars is market for a  
20 success fee for a CRO.

21 So what does Mr. Dempsey tell us when we look at his  
22 declaration? What Mr. Dempsey tells us is that Mercer  
23 conducted a market study that reviewed the retention of CROs in  
24 bankruptcy since 2005. Mercer reviewed over thirty cases where  
25 a CRO was appointed and, in the cases where a success fee was

1 provided, the median was two million dollars, exactly where we  
2 are with Mr. Kruger. The seventy-fifth percentile was three  
3 million dollars.

4 Mr. Dempsey also looked, in particular, at five case  
5 examples where the CRO performed the duties of a CEO as well,  
6 and in those cases he found that the median was three million  
7 dollars and that the seventy-fifth percentile was thirteen  
8 million dollars, significantly higher than what Mr. Kruger is  
9 seeking. If you take those five cases out and you look at the  
10 ones where the CRO was purely functioning in the CRO  
11 capacity -- CRO -- the median is 1.75 million, and the seventy-  
12 fifth percentile is 2.2 million. Mr. Kruger's 2 million falls  
13 in between.

14 Mr. Dempsey also spent some time conducting  
15 correlation analyses, trying to determine links between certain  
16 aspects of the cases he reviewed and the amount of the success  
17 fee. He looked at the size of the asset base, he looked at  
18 sale proceeds, he looked at creditor recoveries, and he looked  
19 at other measures of enhanced value for creditors. He  
20 considered in his analysis the benefits obtained because of  
21 Mr. Kruger. In particular, he looked at the increased value  
22 obtained by the estate through the ultimate AFI contribution,  
23 and he looked at the cost savings that arose out of shortening  
24 the length of the bankruptcy case. And we know where we were  
25 when Mr. Kruger was appointed. I don't think there's a doubt

1 that he helped speed this case up.

2 Under each of Mr. Dempsey's analyses, the proposed  
3 success fee is reasonable. Mr. Dempsey looked at a couple of  
4 other issues that are relevant to today. He looked at the  
5 correlation between the size of the team -- the CRO's team, and  
6 the amount of the success fee, and he found that the empirical  
7 correlation between the size of the team and the size of the  
8 fee was weaker than the link between the asset size and the  
9 amount of the success fee. He also looked at the relationship  
10 between the duration of the engagement and the fee, and found  
11 that there was not a strong correlation, not as strong as the  
12 size of the assets. In my view that makes sense, because you  
13 want to reward reasonable efficiency. If the case had lasted  
14 five or six months longer, Mr. Kruger's hourly rate would be  
15 much less, but we'd spend another hundred million dollars to  
16 get there and that doesn't benefit anybody. So Mr. Dempsey's  
17 conclusion is that the best way to assess Mr. Kruger's proposed  
18 success fee is based on his contributions rather than the time  
19 or resources used in the engagement.

20 Mr. Nolan, of FTI, and his team analyzed ten recent  
21 Southern District bankruptcy cases, and he looked at the  
22 liabilities. And determining that the two million was  
23 reasonable, he said, if I apply the same percentage of success  
24 fee to total liabilities that I saw in these cases to ResCap  
25 where we had fifteen billion dollars in liabilities, I get an

1 amount of 2 and a half to 2.8 billion dollars -- I'm sorry --  
2 million dollars as a success fee, and we're significantly below  
3 that.

4           FTI also conducted an incremental recovery analysis,  
5 and what they essentially did, Your Honor, is they looked at  
6 the KEIP that was approved by the Court with respect to six  
7 executives. And they said, okay, these six executives are  
8 rewarded based on how well they do in recoveries on FHA/VA  
9 loans. And what Mr. Nolan said is, if I look at the target for  
10 the reward and the target for the recovery, and then I try to  
11 figure out how much more value the estate has to obtain in  
12 order for these executives to get the maximum award, what do  
13 those numbers reflect?

14           And so Mr. Nolan concluded that in order to achieve  
15 the highest amount of award and get an extra 173,000 dollars,  
16 we'd have to obtain 52 and a half million dollars of  
17 incremental value over the target for these loans. And so one  
18 way to look at it is, so we achieve 52 and a half million  
19 dollars of additional money for creditors and we get .033  
20 percent of that as enhanced value fee. And so when Mr. Nolan  
21 applied that percentage to the incremental value represented by  
22 the increase in the AFI contribution, it came to a very large  
23 number. And so, thinking about it, you can't ascribe a hundred  
24 percent of the credit for the additional AFI contribution to  
25 Mr. Kruger. He's good but he's not -- it's not that good.



1 Right? It took lots of us to get that money out of AFI,  
2 including the creditors' committee, obviously.

3 So what Mr. Nolan did is he effectively created three  
4 different measurements: twenty-five percent of the credit to  
5 Mr. Kruger, fifty percent and seventy-five percent. And the  
6 median in that analysis was 2.228 million dollars of a success  
7 fee, which is in line with the 2 million dollars. So looking  
8 at the evidence that's uncontroverted and submitted in support  
9 of the application, Your Honor, two million dollars is  
10 reasonable and market.

11 Now, the U.S. Trustee's objection; as I read it, it  
12 raises essentially three arguments; the first is that the CRO's  
13 compensation, in order to be reasonable, has to be assessed on  
14 an hourly-rate basis, much like an attorney retained under 327.  
15 And, Your Honor, that's just -- that's not the law. In the  
16 cases cited by the U.S. Trustee's office, they deal with 330  
17 analysis of attorney's fees.

18 The cases that analyze success fees and transaction  
19 fees, like XO Communications from this jurisdiction, rejected  
20 the hourly-rate analysis for these types of fees. Rather, the  
21 relevant inquiry is whether Mr. Kruger's services were  
22 necessary and beneficial to the estate at the time they were  
23 rendered, and whether the success fee is reasonable based on  
24 the market. I don't believe there's any dispute concerning the  
25 necessity or benefit of Mr. Kruger's services in this case. As

1 for whether the success fee is reasonable based on the market,  
2 I think that's what Mr. Dempsey and Mr. Nolan's declarations  
3 establish.

4           The next argument of the U.S. Trustee is that  
5 Mr. Kruger wasn't really acting as a CEO, so there needs to be  
6 a discount. And I think Mr. Dempsey's analysis, when you look  
7 at the numbers -- even if you pulled out the cases where the  
8 CRO was acting as the CEO, it's still in the range. So I'm not  
9 sure whether you spend seven or twenty-seven percent makes a  
10 difference in the analysis at the end of the day.

11           Now, the third argument the U.S. Trustee makes is that  
12 the CRO compensation is excessive given the fact that  
13 Mr. Kruger was acting alone as opposed to with an army of  
14 advisors. And the board asked Mr. Dempsey to look at this  
15 before the U.S. Trustee objected, because it wanted to see if  
16 there was a correlation. And what Mr. Dempsey tells us is the  
17 correlation is far weaker than the correlation between asset  
18 size and success fee because it's the accomplishments you  
19 should measure, not the size of the team.

20           Your Honor, we believe that Mr. Kruger's  
21 accomplishments speak for themselves, and we believe the  
22 success fee is reasonable and appropriate; we think the  
23 evidence demonstrates that. And we'd ask the Court to approve  
24 the motion, overrule the objection. Unless Your Honor has any  
25 questions for me, for Mr. Kruger seated behind me, or any of

1 the declarants, that concludes my presentation.

2 THE COURT: Thank you.

3 MR. MARINUZZI: Thank you.

4 THE COURT: Mr. Driscoll, are you going to argue?

5 MR. DRISCOLL: Yes, Your Honor. Good morning, Your  
6 Honor. Mike Driscoll for the U.S. Trustee.

7 Your Honor, we'd like to make a few points. Our first  
8 point is that we are asking the Court to adopt the standard for  
9 evaluating success or completion fees that was enunciated in XO  
10 Communications and Northwest Airlines. In those cases, Judge  
11 Gonzalez and Judge Morris, respectively, considered whether a  
12 success-fee applicant had proved the nexus between what was  
13 achieved and that applicant's efforts. Also, in Northwest,  
14 Judge Morris said that where the efforts of that applicant were  
15 in tandem with other applicants, that the success fee was not  
16 merited.

17 Here we believe that the success fee was achieved in  
18 tandem with that of other professionals. Even in the Nolan  
19 declaration, the debtors conceded that Mr. Kruger was not  
20 solely responsible for the success here. In fact, they assign  
21 a less than fifty percent attribution to him. By most reports,  
22 it was the imminent release of the examiner's report and the  
23 personal efforts of Judge Peck as the mediator that were  
24 critical in the plan negotiations.

25 THE COURT: You know, Mr. Driscoll, when I think back

1 to early in this case -- and here's where I think Mr. Marinuzzi  
2 perhaps overstates how this case was proceeding and understates  
3 the difficulties -- when this case filed with a pre-petition  
4 plan support agreement and the case was described first day or  
5 second day or in the press -- I don't remember exactly where --  
6 as a pre-packed -- and I commented about this before -- it was  
7 as far from pre-packed as one could get. And whether fairly or  
8 not, the credibility of the debtors' management was severely  
9 challenged. The pre-petition plan support agreement had  
10 virtually no support from creditor constituencies other than  
11 those that signed the agreement. And I'm not sure I used the  
12 term early in the case, but it seemed to me that, yes, the  
13 parties were rational enough to proceed toward the sale of the  
14 assets, but in many ways I consider this case to be an almost  
15 freefall before the CRO was appointed.

16 At, at least, one hearing on a motion to extend  
17 exclusivity, I expressed my displeasure with how the case was  
18 proceeding and the inability of the debtors and its  
19 professionals to seek to negotiate with the broader creditor  
20 constituencies. And I know I commented from the bench more  
21 than once about that, and I think I made it pretty clear that  
22 future extensions of exclusivity were going to depend on good-  
23 faith negotiations moving forward.

24 I think the reality from the Court's standpoint,  
25 Mr. Driscoll, is, the two things that moved the process along

1 were Judge Peck's appointment as the mediator -- and it's fair  
2 that the debtors made that motion for an appointment of a  
3 mediator, and I selected Judge Peck -- and the appointment of  
4 Mr. Kruger as the CRO. No one will ever know whether we'd be  
5 sitting here today talking about a CRO success fee, whether  
6 we'd have a confirmed plan, whether this case -- whether a  
7 Chapter 11 trustee would have been appointed, what would have  
8 happened if a CRO with credibility among all creditor  
9 constituencies hadn't been appointed and so that the broader  
10 group of parties believed that there was an honest broker with  
11 whom they could sit and negotiate.

12           So I think, when you focus solely on how many hours  
13 Mr. Kruger spent, considerable though those hours were, the  
14 real accomplishments in this case came about because the CRO  
15 was someone with -- no one disputed his eminent qualifications,  
16 experience, restructuring professional credibility, with all  
17 constituencies in the case. And I don't know where we're --  
18 I'm not sure we would have a confirmed plan today had that not  
19 occurred.

20           So Judge Gonzalez, in XO Communications -- there he  
21 was talking about a transaction fee, but I think -- I'm not so  
22 sure -- I don't really view that as very differently. He  
23 talked about the factors under 330 that do not apply. I mean,  
24 he talked about time spent and rates charged. That's in XO  
25 Communications, 398 at page 113.

1 MR. DRISCOLL: I can address that, Your Honor.

2 THE COURT: So I think -- I'm not saying that the time  
3 spent is irrelevant, but where we're talking about a success  
4 fee, having a CRO spend another 1,000 hours but couldn't  
5 accomplish very much, or didn't have the credibility to  
6 accomplish very much, wouldn't help at all.

7 MR. DRISCOLL: I understand, Your Honor. So we're  
8 asking the Court to adopt the standard of XO, but not the  
9 result. Obviously, the result goes away from us.

10 THE COURT: Well, when you say "adopt the standard of  
11 XO", Judge Gonzalez specifically talked about factors that do  
12 not apply: time spent or rates charged.

13 MR. DRISCOLL: Absolutely, Your Honor, he did say  
14 that. But in XO, you had -- Houlihan Lokey was the financial  
15 advisor, and they were not being paid by the hour. Here we  
16 have Mr. Kruger, who is an hourly professional.

17 THE COURT: Well, a portion -- it was clear from the  
18 start of this case -- from the time when his engagement was  
19 first approved, didn't have an amount, but it contemplated that  
20 there would be a success fee. The amount was going to be  
21 determined later, and it was determined later. And when the --  
22 remind me about this, Mr. Driscoll, when the amendment to the  
23 engagement letter was approved by the Court and it specifically  
24 included the two million amount, subject to determination of  
25 reasonableness under the 330 standard, but my recollection is

1 your office did not object to approval of the amendment to the  
2 engagement letter. It certainly reserved all -- I'm not  
3 suggesting -- at least you were very clear -- your office was  
4 very clear; it reserved this issue of reasonableness under 330.  
5 But I mean, you knew what the outer limit was that Mr. Kruger  
6 could seek, the two million dollars. Am I correct on that?

7 MR. DRISCOLL: You are absolutely correct, Your Honor.  
8 The reason we did not object to the amendment, at that time,  
9 was because we were specifically given 330 rights --

10 THE COURT: Sure.

11 MR. DRISCOLL: -- to be reviewed at the end of the  
12 case.

13 THE COURT: Absolutely.

14 MR. DRISCOLL: There were variables and there were  
15 contingencies that could have occurred in that time. For  
16 example, we were not sure whether the case would even confirm,  
17 given the outstanding issue with the JSN trial. So -- and we  
18 were also not sure --

19 THE COURT: We'll never know.

20 MR. DRISCOLL: Absolutely, Your Honor. And I don't  
21 want to engage in supposition on it, but also, we were not sure  
22 whether the committee was going to extract further reductions,  
23 like they're contemplating at the end of this case. So there  
24 was variables there that we didn't want to interrupt at that  
25 point. But not --

1 THE COURT: So Mr. Driscoll, let me ask you this. So  
2 my recollection is that when I've taken up quarterly fee  
3 applications in this case, for all professionals, they've been  
4 in the seventy-five to a hundred million dollar range for a  
5 quarter, for one quarter. And so if this case had dragged on  
6 for just three more months, as the hotly contested case that it  
7 was, and another seventy-five to a hundred million dollars in  
8 professional fees, chargeable to the estate, had been burned,  
9 you'd be penny wise and pound foolish to suggest that paying a  
10 success fee of two million dollars to a CRO to put an end to  
11 that is somehow not appropriate.

12 MR. DRISCOLL: Understood, Your Honor. And the U.S.  
13 Trustee would not advocate a position where we would prefer the  
14 estate incur a hundred million dollars in excess fees to save  
15 two million dollars. That's not what we're saying here. We're  
16 saying forget about XO Communications, Your Honor, and  
17 Northwest; Judge Morris said that where the professionals --  
18 where the applicant's standard was whether they had conducted  
19 their achievements in tandem with other professionals, that the  
20 success fee was not merited. And I would say that that hourly  
21 rate analysis that Judge Morris did conduct in Northwest is  
22 appropriate.

23 I'll give you an example, Your Honor. In that case,  
24 Lazard had requested a 3.25 million dollar success fee. Judge  
25 Morris did conduct an hourly rate analysis, and she determined



1 that if the 3.25 million dollar success fee was given, that the  
2 effective hourly rate of that professional would have been  
3 1,400 dollars. And she rejected it on that basis. She said  
4 that their efforts were in tandem with other professionals and  
5 that, as a result, they were not entitled to that. She said  
6 that they were already well compensated at 876 dollars per  
7 hour.

8 And I'd like to compare this case, Your Honor, to one  
9 more case. The debtors cite a litany of cases in the Nolan  
10 declaration. And we went through those, and we believe none of  
11 those cases are analogous. But I'd like to point out how far  
12 those cases are, by using the Kodak example. In Kodak, the CRO  
13 team of AP Services incurred over 96,000 dollars. They asked  
14 for a three million dollar success fee at the end of the case.  
15 Their total compensation came to be fifty-two million dollars.  
16 So I went and divided that number to find the hourly rate.  
17 That hourly rate was 547 dollars. So to compare to this case,  
18 if we add Mr. Kruger's --

19 THE COURT: What's his total -- what's the total  
20 compensation Mr. Kruger would receive in this case, with the  
21 hourly fee and the success fee that he's seeking?

22 MR. DRISCOLL: Approximately 3.2 million, Your Honor.  
23 And when we divide the 1,300 hours by that 3.2, it comes out to  
24 be around 2,300 dollars per hour. Again, as --

25 THE COURT: So you think that 3.2 million total, as

1 compared to -- how much did you say was in Kodak, the total?

2 MR. DRISCOLL: Adding the success fee --

3 THE COURT: Fifty-two million?

4 MR. DRISCOLL: -- fifty-two million. Here that  
5 success fee -- when you factor it in together, you do that  
6 hourly rate analysis, Your Honor, it comes out to be  
7 approximately 2,300 dollars per hour.

8 THE COURT: That's fundamentally why I have problems  
9 with the approach that you recommend, because it could be very  
10 conceivable, in a case such as ResCap, you could have a CRO  
11 that could have incurred fifty-two million dollars in fees,  
12 hourly, plus the success fee that ultimately -- and here, which  
13 I think I commented at the time that I confirmed the plan; I  
14 think certainly it was the most complicated case I've had.  
15 That doesn't necessarily mean that there -- there certainly are  
16 plenty of other complicated cases, but this was an extremely  
17 complicated case with very challenging issues, that was not  
18 going well at the time that Mr. Kruger was appointed as the  
19 CRO. And one -- he shouldn't let it go to his head, but the  
20 fact that we are where we are today, and the total compensation  
21 he's seeking is 3.2 million dollars, as opposed to 50 or more  
22 million in other cases, it's the -- to me, it's the problem of  
23 focusing primarily on hourly rates. Yes, that's the primary  
24 driver with respect -- as a cap, perhaps, with respect to  
25 lawyer professionals.

1           And it would be one thing if the engagement letter, as  
2 originally provided, and then as amended, didn't expressly  
3 contemplate a success fee, subject to reasonableness, but  
4 that's where I have the problem about saying that the hourly  
5 rate should be the primary driver. I mean, in big cases now,  
6 the hourly rate of senior partners, with less experience than  
7 Mr. Kruger brings to the table, are 1,200 dollars or more. So  
8 I'm not saying -- I'm not -- I think judges aren't happy about  
9 how expensive these cases are, but the reality is that the  
10 hourly rates for lawyers are pretty high today.

11           And if the results in the case, the accomplishments in  
12 the case are substantial -- you know, Mr. Marinuzzi talked  
13 about the experts', here, effort to quantify the additional  
14 value. We'll never know what the saved expenses are. I dare  
15 say, given what the burn rate was, what I was seeing in the  
16 quarterly fee applications, I have little doubt that we would  
17 have been one, two, three quarters -- quarters, meaning three-  
18 month periods -- down the road before there would have been a  
19 confirmed plan, if then. So I come back to where quarterly  
20 fees were in the seventy-five to a hundred million dollar range  
21 with no end in sight. What was in the best interests of all  
22 constituencies in this case was to get this done. You know  
23 don't doubt that, do you?

24           MR. DRISCOLL: No, absolutely, Your Honor. The U.S.  
25 Trustee does not doubt that. But the way we viewed Mr.

1 Kruger's role in this case is essentially as a quasi-  
2 professional. He's not a traditional CRO, as we have in Kodak,  
3 where the CRO team had two individuals filling executive  
4 positions.

5 THE COURT: Yeah, but the biggest drivers in this case  
6 were litigation claims. You know, I didn't say this before,  
7 but when the so-called pre-pack, the pre-petition plan support  
8 agreement, the claims of the -- involving the RMBS trust, in  
9 the billions -- billions. The liabilities, the securities  
10 claims, the claims -- this case, the complexity of this case.  
11 Yes, I mean, the asset sales went pretty well, and Mr. Kruger  
12 doesn't get the credit for that, okay; he's not seeking the  
13 credit for that. But okay, so that brought a pot of money into  
14 the estates, but how was that going to get whacked up? Was  
15 there going to be an agreement about it? What was -- I mean,  
16 this was a heavily litigation, claim-driven case. That's what  
17 added most of the complexity to it after the auction.

18 And someone with Mr. Kruger's background and  
19 experience, I would say, was what was needed in a case of this.  
20 That might not -- he might not have been the appropriate CRO in  
21 a case like Kodak or Northwest, or a case -- Kodak ended,  
22 unfortunately, as well, I think, you know, no one could be  
23 particularly pleased with how that all ended up for a great  
24 company like Kodak. Northwest was an operational restructuring  
25 and a financial restructuring, okay.

1           So pick your professionals for the skill set that's  
2           needed to accomplish the results that need to be accomplished.  
3           You don't really dispute that Mr. Kruger had the skill set that  
4           really was called for in a case such as ResCap, do you?

5           MR. DRISCOLL: No, absolutely, Your Honor. We feel  
6           that the debtors were lucky to have Mr. Kruger's experience.  
7           But we feel that he was really just -- he was essentially like  
8           a legal advisor to the debtors, and he was being paid on an  
9           hourly basis, similar to the other retained professionals,  
10          although he wasn't retained under 327. And that's why we've  
11          been conducting this --

12          THE COURT: You know, there are a lot of --

13          MR. DRISCOLL: -- hourly rate analysis.

14          THE COURT: -- financial professionals who get  
15          retained and have a flat monthly fee, for example, and then a  
16          transaction success fee. So it's not unusual to have an hourly  
17          or a flat monthly fee plus the success fee.

18          MR. DRISCOLL: Absolutely, Your Honor. Those are  
19          common in any financial advisor case. But that just raises the  
20          issue that he was -- his role really bleeds over different  
21          sides. On the one hand, he was an officer of the debtor. On  
22          the other hand, he was being paid, not a salary, but on an  
23          hourly basis, and he was retained specifically for the plan  
24          negotiations.

25          And again, if we were to analogize him as a

1 professional, he is being paid almost twice as much as any  
2 professional in this case. Your Honor cited 1,200 dollars per  
3 hour. We're seeing that now in the last interim fee  
4 applications. And although the debtors are lucky to have Mr.  
5 Kruger here, we feel that he was adequately paid --

6 THE COURT: Okay.

7 MR. DRISCOLL: -- at his hourly rate.

8 THE COURT: All right. I understand your argument.

9 MR. DRISCOLL: Just a few more points, Your Honor.

10 THE COURT: Go ahead. Sure, go ahead.

11 MR. DRISCOLL: The debtors do not cite at least one  
12 case where a CRO was retained and no success fee was requested,  
13 and that's In re Dewey & LeBoeuf, Your Honor. Joff Mitchell of  
14 Zolfo Cooper was the CRO in that case. And although the  
15 case --

16 THE COURT: If you want to talk about disaster cases,  
17 I mean --

18 MR. DRISCOLL: Well, actually, you know, Your Honor,  
19 on the first day of the case, there was a possibility that it  
20 was going to end up like Coudert Brothers, as this long, drawn  
21 out case, where the partners were not --

22 THE COURT: So you want Mr. Mitchell to apply for a  
23 success fee?

24 MR. DRISCOLL: Perhaps, but it's too late now, Your  
25 Honor. But all kidding aside, he didn't ask for one. And that

1 was after he had -- him and Mr. Togut had led the efforts to  
2 achieve a PCP. So they're not -- it shouldn't always be  
3 requested at every case, and I --

4 THE COURT: No, but this was -- it was clear from the  
5 start. I mean, Mr. Kruger's engagement letter contemplated a  
6 success fee. The amended engagement letter capped what it was  
7 going to be, subject to a reasonableness analysis. So I mean,  
8 I have your point on this. I think the fact that the  
9 creditors' committee does support the application is important  
10 too. I mean, it's coming out of their hide, basically. But --

11 MR. DRISCOLL: It is, Your Honor. One final point.

12 THE COURT: Go ahead.

13 MR. DRISCOLL: Just very briefly, Your Honor. As Your  
14 Honor knows, this is one of the most expensive bankruptcy cases  
15 in history. According to the November monthly operating  
16 report, the professional fees of this case exceed 477 million  
17 dollars. And one can look at this success fee two ways. One  
18 can say 2 million dollars of 477 million is nothing, in the  
19 scheme of things. Or one can say that, given the high fees of  
20 this case, it deserves extra scrutiny. And that's what we've  
21 been doing here, Your Honor. Now, can I --

22 THE COURT: I appreciate that. I just want you to  
23 understand that that --

24 MR. DRISCOLL: I appreciate Your Honor's time, and  
25 you've definitely heard us out.

1 Just one final thing, Your Honor. To put that success  
2 fee into perspective, the success fee here is so high that it  
3 is nearly as high as all of the reductions that Your Honor has  
4 ordered in the four interim periods.

5 THE COURT: I'm not sure -- I'm not sure what the  
6 relevance of that statement is --

7 MR. DRISCOLL: It's --

8 THE COURT: -- to the issue before me.

9 MR. DRISCOLL: Understood, Your Honor. What we're  
10 just trying to say is that this is a large amount of money, in  
11 the scheme of things, because --

12 THE COURT: It is; I agree.

13 MR. DRISCOLL: And we take every dollar that -- for  
14 all of our omnibus objections, we take every dollar seriously.  
15 And that's it, Your Honor.

16 THE COURT: Okay. Thank you, Mr. Driscoll.

17 MR. DRISCOLL: Thank you for hearing me out, Your  
18 Honor.

19 THE COURT: Okay. Thank you. I'm going to take it  
20 under submission.

21 MR. DRISCOLL: Thank you, Your Honor.

22 THE COURT: Okay?

23 MR. MARINUZZI: Thank you, Your Honor. The next item  
24 on the agenda is, I believe, on page 17, item number 5, and  
25 that is the motion of Nancy K. and Linton C. Layne to allow



1 complaint to determine secured status and grant release of lien  
2 of GMAC Mortgage, LLC. I will cede the podium to my partner  
3 Mr. Rosenbaum for that matter, but I would ask the Court if I  
4 may be excused, along with Mr. Kruger and the declarants who  
5 are on the phone.

6 THE COURT: Yes, you may.

7 MR. MARINUZZI: Thank you, Your Honor.

8 MR. DRISCOLL: Your Honor, may the U.S. Trustee be  
9 excused as well?

10 THE COURT: Absolutely, Mr. Driscoll.

11 MR. DRISCOLL: Thank you.

12 THE COURT: Mr. Masumoto, thank you.

13 MR. DRISCOLL: Thank you, Your Honor.

14 MR. MASUMOTO: Mr. Masumoto. Thank you.

15 MR. ROSENBAUM: Good morning, Your Honor. Norm  
16 Rosenbaum for the liquidating trust and the debtors. This is  
17 the motion of Ms. Layne. I don't know if I heard her make a  
18 telephonic appearance.

19 THE COURT: All right. Is Mr. or --

20 MR. ROSENBAUM: It's a Miss.

21 THE COURT: -- Ms. Layne on the phone?

22 Go ahead, briefly.

23 MR. ROSENBAUM: Your Honor, this motion --

24 MS. LAYNE: Yes, Ms. Layne is on the phone.

25 THE COURT: Oh, okay, all right.

1 Go ahead, Mr. Rosenbaum.

2 MR. ROSENBAUM: Your Honor, this is Ms. --

3 THE COURT: Well, it's her --

4 MR. ROSENBAUM: -- it's Ms. Layne's motion.

5 THE COURT: -- it's her motion.

6 Go ahead, Ms. Layne.

7 MS. LAYNE: Basically, what I would like to address  
8 the Court with today is that ResCap or GMAC has provided a  
9 document by a -- excuse me on the name -- Ms. Delehey, whereby  
10 she admits that she has gone to several other people to gather  
11 information about documents, and she has no first-hand  
12 knowledge of the documents. And so I'm questioning -- and then  
13 GMAC came back and said that in fact they did not have any  
14 access -- or I'm sorry, no ownership in the note. And so I'm  
15 questioning where they got their authority to actually say that  
16 I owe them some money, because I would have made payments, and  
17 I showed that in my response, that I had made payments to them  
18 and then to some other company. So I made -- there were  
19 several different names that they had used, along the way, for  
20 withdrawals from online payments. So I'm not actually sure who  
21 I was, in fact, paying. I was receiving, I believe, a  
22 statement from GMAC, but I'm not sure exactly who in fact was  
23 getting payments.

24 And since this is a case that has to do about title of  
25 property from the standpoint of they're claiming that I owned

1 them and, in fact, the property -- they haven't produced any  
2 work orders declaring they're owners of the trust. They did  
3 not provide any records that showed that they had any ownership  
4 in Washington County, which would claim that that's in fact  
5 where the County land records exist, which would be a statutes  
6 of fraud cause of action. And any documents connecting their  
7 capacity to collect the proceeds, they haven't provided any.

8 Then I would question whether GMAC, in reporting to  
9 this Court that they had some interest originally, when they  
10 sent me the notice that said, by the way, we have interest in  
11 your property because we've been collecting from you, I just  
12 want to know what they've shown on their tax returns, if they  
13 reported appropriately.

14 Now, if they don't have these documentation and  
15 things, I'll give them fourteen days to get them together or  
16 thirty days, whatever they need. I just want to make sure that  
17 the right party is standing in front of me. And if they're not  
18 the party that has any interest, then I recommend that it  
19 goes -- or actually request that the court (sic) be remanded  
20 back down to the state, because that's where the state land  
21 records exist, and no federal court should make ruling on state  
22 land property.

23 THE COURT: Let me -- I want to just understand  
24 something, Ms. Layne. You haven't filed a Chapter 13  
25 bankruptcy proceeding. Am I correct in that?

1 MS. LAYNE: I have not.

2 THE COURT: Okay. Because what you're asking the  
3 Court to do is permit you to file a complaint to strip a second  
4 lien off your home. And I know of no authority that would  
5 permit the Court to do that, except where the borrower is a  
6 debtor in a Chapter 13 case, and then it would be for the judge  
7 before whom the bankruptcy is pending, and not before me.

8 But do you have any authority that -- case law or  
9 statute that says that I can avoid the lien of the second  
10 mortgage because the property -- there's no value securing it,  
11 the value of the home, as you've alleged, is less than the  
12 amount of the first mortgage -- do you have any authority for  
13 that?

14 MS. LAYNE: Correct. I -- well, by the way, my  
15 husband at the time did file a Chapter -- a bankruptcy case.  
16 And no one came forward. So --

17 THE COURT: Well --

18 MS. LAYNE: -- he did during --

19 THE COURT: -- but did --

20 MS. LAYNE: -- between the times of --

21 THE COURT: Go ahead.

22 MS. LAYNE: Yes. But so he did file a case, and no  
23 one came forward. So I was asserting the fact that since no  
24 one had come forward, no one actually had any interest, or that  
25 they didn't have an interest. So --

1 THE COURT: Yeah, but you have to -- in his bankruptcy  
2 case, if he wanted to, what we refer to as, strip the lien,  
3 because there was no value behind it -- no collateral value  
4 behind it -- because if the value of the property is less than  
5 the first mortgage, there's no collateral value securing the  
6 second mortgage. But your husband, if he had a Chapter 13,  
7 would have had to either file an adversary proceeding or a  
8 motion, depending on the jurisdiction in which the bankruptcy  
9 was pending, to --

10 MS. LAYNE: Okay.

11 THE COURT: -- avoid the lien. And you've not made --  
12 the papers that you filed make no such assertion. So I know of  
13 no authority --

14 MS. LAYNE: But I'm saying --

15 THE COURT: Let me finish. I know of no authority  
16 that would, under any circumstances, allow me to avoid a second  
17 lien on your home. Go ahead.

18 MS. LAYNE: Well, is not a lien attached to some  
19 document? Meaning a lien is a lien for the purpose of having  
20 some document create a lien, is it not?

21 THE COURT: Well, you don't dispute that there is a  
22 recorded second mortgage on your home. Am I correct?

23 MS. LAYNE: I don't dispute it. What I dispute is  
24 who's actually making that case or cause or controversy and who  
25 is, in fact -- I said I'd been paying GMAC, but in fact, GMAC

1 then says that they have no interest in the note or the  
2 property. And so therefore, who, by -- is it by osmosis or  
3 what, how did -- or who did they pay, in fact, and who is the  
4 actual lien owed to?

5 THE COURT: Well, before --

6 MS. LAYNE: They're the ones coming forth.

7 THE COURT: -- before -- let me just say. The  
8 debtors' loan servicing business was sold during the course of  
9 this Chapter 11 case to Ocwen. And what the debtors have said  
10 is, and it's consistent with everything else that's been  
11 happening in this case, that before the sale to Ocwen, the loan  
12 was serviced by one of the debtors. And on February 15th,  
13 2013, when the sale to Ocwen closed, Ocwen now services the  
14 loan. I think what the debtors have said is, they don't own  
15 the loan. U.S. Bank is the holder of the second lien for a  
16 mortgage trust -- securitization trust. The debtor --

17 MS. LAYNE: And I have no evidence of that. That's  
18 the problem. There is no evidence that they are the ones that  
19 own it. So that's the question.

20 THE COURT: Well --

21 MS. LAYNE: They're making a claim that they haven't  
22 supported.

23 THE COURT: No, they're not making a claim. I assume  
24 that your --

25 MS. LAYNE: Well, do you have the documents --

1 THE COURT: -- I assume your monthly statements have  
2 been coming from Ocwen now. Do you agree?

3 MS. LAYNE: No. I have not even heard from Ocwen. I  
4 don't even know who they are.

5 THE COURT: All right. I'm going to ask Mr. Rosenbaum  
6 about that. Anything else you want to add, Ms. Layne?

7 MS. LAYNE: No.

8 THE COURT: Okay. Go ahead, Mr. Rosenbaum.

9 MR. ROSENBAUM: Your Honor, as you stated, and  
10 reciting from our papers, we serviced this second mortgage  
11 loan; it was owned by U.S. Bank as trustee for one of the  
12 securitization trusts. The servicing was transferred on  
13 February 15th, 2013 as part of the closing of the Ocwen sale.

14 The debtors have checked their records in light of  
15 this application. It was supported by the declaration of  
16 Lauren Delehey, the chief liquidation counsel now with the  
17 liquidating trust and formerly with the debtors, who checked  
18 the records to confirm that there was, in fact, no interest in  
19 the second lien.

20 I don't know the status of the second lien with Ocwen,  
21 if they have -- the term is -- charged it off, and are no  
22 longer seeking to collect. We don't know that. So I don't  
23 know why --

24 THE COURT: Okay.

25 MR. ROSENBAUM: -- Ms. Layne is not receiving the

1 statements. But the debtors do not have an interest in this.

2 THE COURT: All right. I'm going to take the matter  
3 under submission.

4 MR. ROSENBAUM: Thank you, Your Honor.

5 THE COURT: And I'll enter a decision or order in due  
6 course, Ms. Layne. Thank you very much.

7 MR. ROSENBAUM: Your Honor --

8 MS. LAYNE: Thank you.

9 MR. ROSENBAUM: -- I'll cede the podium to my  
10 colleague, Melissa Hager, for the next matter.

11 THE COURT: Okay.

12 MS. HAGER: Good morning, Your Honor. Melissa Hager  
13 from Morrison & Foerster on behalf of the ResCap borrowers'  
14 trust. Your Honor, the next matter that's before you is on  
15 page 18 of the agenda, and it's the ResCap borrowers' trust  
16 objection to two proofs of claim filed by Shane Haffey.

17 THE COURT: All right. Is somebody appearing for  
18 Shane Haffey?

19 MS. MCKEEVER: Yes, Your Honor. Heather McKeever.

20 THE COURT: Okay. Go ahead.

21 MS. HAGER: Certainly. Thank you, Your Honor. Your  
22 Honor, the objection to the proof of claims -- there are two  
23 proof of claims, claim 2582 and 4402 filed by Mr. Haffey. The  
24 objection seeks to expunge the claims in their entirety with  
25 prejudice, for failure to state a basis for liability against



1 any of the debtors.

2 In addition to the debtors' original objection, the  
3 borrowers' trust filed a supplement to the motion, which is at  
4 document number 6361. And that would be at tab 3 of the second  
5 binder that you have in front of you today, Your Honor.

6 THE COURT: Okay, so it's an appropriate time for me  
7 to address some comments about the supplement that was filed.  
8 And as you know, yesterday there was a motion to adjourn this  
9 hearing, which the Court denied. The motion for adjournment  
10 was filed by Ms. McKeever yesterday, and it raised an issue  
11 that has been causing me considerable concern recently. And  
12 I've noticed that with the claims objections that the debtors  
13 have filed recently, many of them, they follow the practice of  
14 improperly adding new legal theories and grounds for objections  
15 in their replies, arguments that were not raised in the  
16 original objection, and to which the claimant is not given an  
17 adequate opportunity to respond.

18 And the Haffey claim objection is a perfect example of  
19 it. And this problem that I've observed has been more acute  
20 with respect to the omnibus claims objections, where the  
21 debtors' original objection -- initial objection may contain  
22 only a sentence or two ascribing a label to the basis for the  
23 objection: no liability claim; not supported by books and  
24 records. And it's only after the claimant responds two days  
25 before the hearing on this matter, that the debtor puts forth

1 their argument in any real detail.

2 And I recently entered an order denying without  
3 prejudice a claims objection for this very reason. See the  
4 order denying without prejudice the debtors' fiftieth omnibus  
5 objection as to claim number 1574, filed by Rainer P. Warner,  
6 CECF docket number 6236.

7 In the matter before me, with respect to Haffey, Mr.  
8 Haffey was -- never even filed a response on the docket, and  
9 there's considerable amount that's been filed about that --  
10 we'll get to that in a little while -- but yet the debtors  
11 filed an unsolicited supplement with the stated purpose of  
12 updating the Court on the status of the district court  
13 litigation since the objection was originally filed.

14 But the supplement goes on to raise new legal  
15 arguments why the Haffey claims should be disallowed and  
16 expunged; arguments which were not raised in the initial  
17 objection, but which certainly could have been. And I'm  
18 troubled by this practice. This is not the first time this has  
19 happened. It better be the last.

20 And I want to make clear. I'm not -- and the reason I  
21 denied the motion for an adjournment. I'm not going to  
22 consider the new arguments raised by the debtor in the  
23 supplement. That makes Ms. McKeever's request for an  
24 adjournment to respond to the supplement moot, because I'm not  
25 going to consider those arguments.

1 And if it's not clear from what I've said, I want to  
2 make it entirely clear, that I will not consider new arguments  
3 improperly raised for the first time in replies. The debtor  
4 should be especially mindful of this in regards to omnibus  
5 objections to borrower claims. If the objection is not  
6 sufficiently detailed to give the claimant a meaningful  
7 opportunity to respond, I'm not going to grant the objection.

8 So the only grounds on which I'm going forward are the  
9 original grounds asserted.

10 Now, with respect to the response that was not  
11 originally filed on the docket, when did you first see it,  
12 Ms. Hager?

13 MS. HAGER: I first saw it yesterday afternoon --

14 THE COURT: Okay.

15 MS. HAGER: -- when I -- shortly after it was filed.

16 THE COURT: I find that the explanation for why it was  
17 not filed to be untenable.

18 MS. HAGER: Your Honor, on that issue, if I could just  
19 supplement the record a little bit. And just for purposes of  
20 the record, I understand your position with regard to the  
21 reply. And I --

22 THE COURT: Do you dispute it? I mean, it's not the  
23 first time that I've started -- I've started commenting -- this  
24 is the most I've said on this subject, but I've been expressing  
25 my displeasure, and it's growing displeasure.

1 MS. HAGER: Your Honor, I -- if I could take the  
2 adjournment request first.

3 THE COURT: It's not -- forget the adjournment.

4 MS. HAGER: Okay.

5 THE COURT: It's not being adjourned. And I'm not  
6 going to consider the arguments made for the first time in the  
7 supplement. It's as simple as that.

8 MS. HAGER: Understood. And just for the record, with  
9 regard to the adjournment, there was also -- this matter -- the  
10 objection to the Haffey claims was originally filed back on  
11 August 26th of 2013. It was originally -- originally the  
12 response deadline was September 16th of 2013. And it was  
13 scheduled for a hearing in November.

14 For a variety of reasons, including multiple parties'  
15 requests and the Court's calendar, it was adjourned several  
16 times. And I just wanted to point out for the record, with  
17 regard to the allegation in the adjournment that they first  
18 became aware that the reply had not been timely filed for the  
19 September 23rd deadline, number one, there was two other  
20 agendas that have been filed with regard to this objection with  
21 this Court, electronically noticed, et cetera, which both noted  
22 that there was no response filed and that the time to do so had  
23 passed. And that's the agenda for the November 15th hearing at  
24 docket number 5741 and the agenda for the December 17th hearing  
25 at docket number 6127.

1 THE COURT: Well, the claimant's counsel has also  
2 acknowledged that they've known about the fact that it wasn't  
3 filed since -- what was --

4 MS. HAGER: January 14th.

5 THE COURT: -- January 14th. And here we are on  
6 January 30th. And if they knew on January 14th that their  
7 response had not been filed, they should have sought leave to  
8 file it late then, immediately, and not wait until the day  
9 before the hearing. Okay?

10 So I find the explanation for why it was not filed to  
11 be untenable. And I find the delay -- since they've known that  
12 it wasn't filed -- to raise substantial questions as to whether  
13 the claimant's acting in good faith.

14 MS. HAGER: Thank you --

15 THE COURT: They had an obligation to advise the Court  
16 promptly if through some clerical or other mistake, a response  
17 that had been prepared wasn't filed. And I won't review --  
18 there was an issue about who the counsel was at the time and  
19 all that. I'm not going through that.

20 MS. HAGER: Thank you, Your Honor. And I want to --

21 THE COURT: I'm going -- let me finish.

22 MS. HAGER: Sure. I'm sorry.

23 THE COURT: I haven't decided yet whether I'm going to  
24 consider the arguments raised in the response. I've now read  
25 it. And when I take this matter under submission, I'll decide

1 whether to consider the arguments that are raised.

2 Go ahead, Ms. Hager.

3 MS. HAGER: Understood. Thank you --

4 MS. MCKEEVER: Your Honor? May I --

5 THE COURT: No, you may not. You'll get your chance.

6 MS. HAGER: Understood. Thank you, Your Honor. Just

7 I wanted to make sure the record was full in case there's an

8 appeal of something -- of some sort.

9 Going to the reply, Your Honor, I understand your  
10 position. I am fully prepared to proceed on the original  
11 objection. And the purpose of the reply certainly materially  
12 was to update you with regard to the variety of appeals pending  
13 before the Sixth Circuit. And I do think that if you look at  
14 the reply, it's -- the reply is actually thirteen pages long,  
15 and that includes a signature page and the caption page of it.

16 If you look at pages 2 through 7, certainly, of the  
17 reply, those were really in the nature of updating them. I can  
18 take Your Honor's point of from the bottom of page 7 through  
19 the bottom of page 10 that those might be deemed to be outside  
20 the four corners of the original objection.

21 Your position is duly noted, and I'm sure it will not  
22 happen again.

23 Your Honor, the objection seeks to expunge two claims  
24 filed by Mr. Haffey in the amount of five million dollars each,  
25 against one debtor, and that's ResCap. The first proof of

1 claim is purportedly based upon document fraud, forgery, fraud  
2 on the court. The second proof of claim is purportedly based  
3 upon qui tam, document fraud, document forgery, slander of  
4 title, quiet title, fraud on the court.

5 In support of these claims, the proof of claims attach  
6 virtually identical documents to them relating to the various  
7 different actions that are pending in the Eastern District of  
8 Kentucky, as well as the Sixth Circuit.

9 THE COURT: As to which there's no stay in place?

10 MS. HAGER: Correct, Your Honor. This was something  
11 that the Court's familiar with. We attached a document for it.  
12 The stay (sic) has been going forward; there's been multiple  
13 appeals. And one of the items that's attached to the reply was  
14 an updated Exhibit A of the schedule of the litigation, which  
15 was really -- to try to -- effort of the Court to help with  
16 that.

17 But at its core, Your Honor, the claims assert alleged  
18 cause of action arising out of a May 2007 refinancing of  
19 approximately -- no, of exactly one million dollars for a  
20 mortgage loan by the claimant and his wife, and who is also his  
21 counsel, Ms. McKeever, who is on the phone today. The loan was  
22 serviced commencing in July of 2007 by GMAC Mortgage.

23 To date, there have been six separate lawsuits filed  
24 with regard to the transaction, four of which were filed by Mr.  
25 Haffey and/or his wife against the debtors and nondebtor

1 entities, seeking among other relief, to quiet title and to  
2 prevent any number of entities, including the debtors, from  
3 enforcing the terms of the mortgage loan against the claimant.

4 To date, all of his claims against the debtors have  
5 been resolved conclusively in the debtors' favor. Included in  
6 those six lawsuits are two actions brought by -- brought  
7 against the Haffey's. The first one was one that was originally  
8 commenced by GMAC Mortgage; ultimately Deutsche Bank as trustee  
9 was substituted as the plaintiff. And that one was a  
10 declaratory judgment seeking a finding that the Haffey's  
11 purported rescission of the mortgage was ineffective. A final  
12 judgment was entered on that, finding that the rescission was  
13 ineffective, that Deutsche Bank was the holder of the note and  
14 the mortgage, and entitled to proceed with whatever rights that  
15 that has.

16 A lot of these actions have been pending since 2008,  
17 and there have been numerous appeals, some of which are still  
18 pending before the Sixth Circuit, upon which there is no  
19 automatic stay, and the parties have been free to go forward  
20 with them.

21 And if you look at the documents and you look at all  
22 of the various pleadings and whatnot, it takes you a long time  
23 to get through them all. And it's clear that there's been a  
24 lot of, what I'd say, delay type of tactics, whether it be to  
25 certify an action -- certify an issue to New York State Court,



1 which I'm not sure exactly how New York has any bearing in a  
2 property and transaction that's based in Kentucky, and other  
3 type of things, including various motions to -- filed by the  
4 claimant -- to reconsider, et cetera.

5 And I think if you listen to the claimant and you  
6 listen to his wife, counsel on the phone, they're going to try  
7 to explain to you that this is very complicated; there's a lot  
8 of things going on here. There was a big fraud and conspiracy  
9 of which one of the debtors was involved. Your Honor, it  
10 really comes down to something that's very simple, and it's  
11 something that's included in the original objection. You don't  
12 even need to get to the reply to, and that's basically four  
13 different arguments.

14 One, is that they sued the wrong debtor. They only  
15 sued -- sorry, they filed a claim against the wrong debtor.  
16 They only filed claims against ResCap. And I recognize you may  
17 not consider their response that was filed, and in their  
18 response they basically say, we used the caption of -- the  
19 consolidated caption -- these actions have been consolidated.  
20 That's not correct. The bar date order clearly provides, you  
21 need to -- if you have a claim against a particular debtor, you  
22 need to file it against that debtor. They sued GMAC Mortgage  
23 on several different occasions, have named them in the  
24 lawsuits, but for some unknown reason they list ResCap in the  
25 proof of claim. That is an independent basis alone to expunge

1 the claims.

2 But giving them the benefit of the doubt, and  
3 recognizing that they could have named GMAC Mortgage or a  
4 couple of the other ancillary debtors that they named in some  
5 of their state court actions, the proof of claim should still  
6 be expunged on the basis of res judicata and collateral  
7 estoppel.

8 And then finally, the fourth argument, and again, just  
9 relying on the original objection, is that even if they weren't  
10 entitled to res judicata and collateral estoppel which were in  
11 the Sixth Circuit, and unlike, Your Honor, when I was here  
12 earlier this week we were in the Ninth Circuit in California,  
13 when there's an appeal pending, you don't get res judicata  
14 benefit, here you do. In the Sixth Circuit in Kentucky law --

15 THE COURT: So, they argue -- and by raising the  
16 question I'm not suggesting I'm ultimately going to consider  
17 the response. But in the response, I read it as raising one  
18 new issue not previously presented to the Court by the  
19 claimant.

20 In the response, the claimant argues that res judicata  
21 doesn't apply to bar his claims because new facts have come to  
22 light that prevented his original claim from being fully and  
23 fairly litigated. And their response points to the Delehey  
24 declaration in -- with respect to the date on which the note  
25 was executed, whether it was May 18th, 2007, rather than May

1 14th, 2007.

2 So address for me, if you would, why that should not  
3 affect the res judicata analysis that I'm required to make.

4 MS. HAGER: Your Honor, this is one of the very issues  
5 that has been litigated in four of the actions that they've  
6 commenced against the debtors as other people.

7 THE COURT: As I understand it, they've gone back to  
8 federal court in Kentucky and have now raised the issue  
9 pointing to the Delehey declaration as to whether the note was  
10 executed on -- whether it was --

11 MS. HAGER: May 18th.

12 THE COURT: -- May 18th or May 14th. So that issue's  
13 back in the federal court in Kentucky.

14 MS. HAGER: That issue has always been in the federal  
15 court of Kentucky and is currently before the Sixth Circuit.  
16 It's raised as -- it's a red herring, Your Honor. It's raised  
17 as being a new issue. If you go back and look at Exhibit G to  
18 our original objection, you'll see that the court rejected  
19 these issues. They were raised as part of the declaratory  
20 judgment. The one new, I guess, nuance you could have is that  
21 you have the Delehey declaration that has -- that uses a May 18  
22 date as compared to the 14th date, but that's -- that doesn't  
23 impact the claim here.

24 Number one, we were only a servicer. Number two, we  
25 didn't even come in -- and if you look at the papers that were

1 filed in the Sixth Circuit District Court, they acknowledge  
2 that GMAC didn't come in until July as a servicer. So it's a  
3 red herring. It's not new. It's certainly another twist on  
4 another way of arguing it, but it's not new, and it has been  
5 decided by the court that Deutsche Bank, as trustee, is the  
6 current valid holder of the mortgage and the note.

7 So it's not --

8 THE COURT: Okay.

9 MS. HAGER: It doesn't matter. I mean, I think  
10 actually -- and I've read their response, and Your Honor, I  
11 don't think it changes anything. Even if this Court were  
12 willing to accept it and consider it, it doesn't change any of  
13 the arguments. There's res judicata. You have four different  
14 actions that were commenced. And I think you've got res  
15 judicata on more than the six causes of action that they've  
16 alleged in this -- in his two proofs of claim. In fact, I dare  
17 say, Your Honor, I think most attorneys out there would be at a  
18 loss to come up with a new claim that has not yet been asserted  
19 against -- by the claimant.

20 So I don't see how that -- especially with regard to  
21 res judicata which is much broader than a collateral estoppel,  
22 you could have, should have, would have named it in the  
23 lawsuit, and it's all arising out of the same transaction and  
24 facts.

25 THE COURT: Res judicata would apply, in your view, if

1 the claim was or could have been asserted in the prior action?

2 MS. HAGER: Correct, Your Honor. And I think the  
3 cases teach us -- the cases cited in our objection teach us  
4 exactly that point.

5 THE COURT: Okay.

6 MS. HAGER: Collateral estoppel is a little bit more  
7 of a limited argument. We have cited to that in the paper.  
8 And here you actually do have what's referred to as the GMAC-  
9 Haffey action, where Mr. Haffey sued GMAC. It was dismissed  
10 with prejudice on the merits. There was twelve different  
11 causes of action including common law causes of action on  
12 fraud, federal causes of action on violations of TILA,  
13 federal -- Fair Debt Collection Practices Act, so I think even  
14 if you look at the more minute legal principle of collateral  
15 estoppel, that he's estopped as well.

16 THE COURT: Okay, so --

17 MS. HAGER: And --

18 THE COURT: Move on to the next -- so you've dealt  
19 with -- the claim is against the wrong debtor, res judicata.  
20 Any other arguments?

21 MS. HAGER: The other argument, Your Honor, is even if  
22 you throw res judicata and collateral estoppel out the window,  
23 and you look at the four corners of the proof of claim and the  
24 attachments, and even if you add into it -- actually I don't  
25 think in their response they added anything new other than a

1 declaration, which is a regurgitation of what's been done in  
2 the Sixth Circuit in Kentucky courts -- on their face, they  
3 still don't -- do not survive a motion to dismiss.

4 THE COURT: Okay.

5 MS. HAGER: They have not set forth the standard.  
6 They have not been able to satisfy the shifting burden of proof  
7 with regard to the claims objection.

8 THE COURT: All right. Let me hear from Ms. McKeever.  
9 Thank you, Ms. Hager.

10 MS. HAGER: Thank you.

11 THE COURT: Go ahead, Ms. McKeever.

12 MS. MCKEEVER: Well, Your Honor, I don't -- it's not  
13 really all that complicated. This issue that we're discussing  
14 with the Delehey declaration, this is a disputed issue from the  
15 beginning. I mean, we're just talking about the original  
16 mortgage documents having --

17 THE COURT: No, what we're talking about -- Ms.  
18 McKeever, what we're talking about is whether res judicata  
19 applies based on the judgments of the courts in Kentucky.

20 MS. MCKEEVER: Well, the supplement is correct in the  
21 procedural layout today. The Sixth Circuit sent back the main  
22 foreclosure case -- which is actually one of the last cases to  
23 be filed -- they sent it back to the district court, so it's  
24 currently sitting in front of the district court. So it's no  
25 longer on appeal, it was deemed not final. And I believe that

1 I don't have and disagreement with their dissertation of the  
2 procedural posture at this point, if that's -- if you consider  
3 the updated procedural posture of the case.

4 And, other than that, we have a motion for an  
5 evidentiary hearing, which I'd like you to consider, so that we  
6 could bring in -- the dates of these original documents are the  
7 vital -- one of the vital aspects of all of this.

8 THE COURT: Ms. McKeever --

9 MS. MCKEEVER: In GMAC -- yes, sir?

10 THE COURT: If res judicata applies, it's the end of  
11 the discussion, there is no basis for an evidentiary hearing.  
12 If res judicata bars the claims -- the two claims that were  
13 filed, there's no basis to get an evidentiary hearing. That's  
14 why I see res judicata -- and I know Ms. Hager argues you filed  
15 against the wrong debtor, and the Court will deal with that, if  
16 necessary, but the key issue that I see is the res judicata  
17 issue. The law in Kentucky -- and state law controls -- is  
18 that res judicata applies to a judgment by the trial -- entered  
19 by the trial court even if the matter is on appeal. Do you  
20 dispute that?

21 MS. MCKEEVER: No, Your Honor. But one of the cases  
22 is not on appeal, it's deemed not final. And it's the case.  
23 And it's the case that has all the counterclaims against the  
24 debtors. It's 09-362.

25 THE COURT: Go ahead with your argument.

1 MS. MCKEEVER: That's all I have to say. I do take  
2 issue with the fact that I think the Court may be leaning  
3 towards thinking that I'm a liar. I know that you have had a  
4 background with Ms. Nora, and I did not discover that the  
5 response had not been filed --

6 THE COURT: May I ask you this?

7 MS. MCKEEVER: As far as I'm --

8 THE COURT: You've acknowledged that you knew that it  
9 wasn't filed as of January 14th, am I correct in that?

10 MS. MCKEEVER: Correct. And I received --

11 THE COURT: So why didn't you --

12 MS. MCKEEVER: -- see the declarations from --

13 THE COURT: Why didn't you immediately bring that to  
14 the Court's attention and ask for leave to file it late? I  
15 mean, what's irr -- and I'm not ruling at this point -- I've  
16 obviously read your response, and I've asked Ms. Hager some  
17 questions based on it. But the point that particularly irks me  
18 is you acknowledge you knew about it since January 14th, and  
19 you waited until virtually two days before the hearing to raise  
20 the issue with the Court. So why did you do that? That's not  
21 Ms. Nora.

22 MS. MCKEEVER: No. Well, I don't want to get into a  
23 spitting contest, but I'm not a bankruptcy practitioner, so I  
24 want to make it clear that this has nothing to do with bad  
25 faith. And I was not aware that Ms. Nora's pro hac had been



1    revoked until all of this came down the pike.  So --

2               THE COURT:  What does that -- if you found out on  
3    January 14th that it hadn't been filed, and you were  
4    representing your husband in connection with this matter, why  
5    didn't you file some pleading or send a letter to the Court  
6    explaining that a response had been prepared, but apparently  
7    hadn't been filed, and requesting that the Court consider it?  
8    You waited until just before this hearing to do -- and what you  
9    ask is that -- then you ask adjourn the hearing.  I've already  
10   dealt with the supplement, so the supplement's not going to be  
11   considered, you don't have to respond to that.  But that's  
12   what's -- that's what I'm miffed about.

13              This seems to be an effort to simply delay.  So why  
14   did you wait -- why didn't you file the response January 14th,  
15   15th or as soon as you learned that it hadn't been filed?

16              MS. MCKEEVER:  Well, all I can tell you is that I was  
17   communicating with Nora and believed that she was going to take  
18   care of it again and did not know that she had not -- that she  
19   was not eligible to be filing anything at this point, unless  
20   she reapplied.  It's my understanding she'd have to reapply to  
21   be in this case.  I can assure you it wasn't in bad faith.  
22   Having a thirty-day delay in this case, or having any delay, is  
23   in the big picture -- this has been going on for four years.  
24   No one would like closure more than my husband and I.

25              THE COURT:  This case is not --

1 MS. MCKEEVER: And we've made multiple --

2 THE COURT: This case hasn't been going on for four  
3 years. All right.

4 MS. HAGER: If I can --

5 THE COURT: All right.

6 MS. MCKEEVER: No, the outside cases have been going  
7 on for four and a half years, Your Honor.

8 THE COURT: Okay.

9 MS. MCKEEVER: No one would like closure more than my  
10 husband and I.

11 THE COURT: All right. And --

12 MS. MCKEEVER: I can assure you of that.

13 THE COURT: Any other --

14 MS. MCKEEVER: Delay is not in our best interests. We  
15 are running a family farm, and all this has done is completely  
16 if not disturbed, it's now paralyzed our ability to run our  
17 family farm.

18 THE COURT: All right. Any other argument on the  
19 merits?

20 MS. MCKEEVER: Yeah, I --

21 THE COURT: Any other arguments on the merits?

22 MS. MCKEEVER: No, Your Honor. I have nothing else to  
23 say at this point, if I can --

24 THE COURT: Okay.

25 MS. MCKEEVER: -- leave my --

1 MS. HAGER: Your Honor, if I can just address just two  
2 points, Your Honor?

3 THE COURT: No, I don't want to hear any further -- I  
4 don't want to hear anything further. The matter's under  
5 submission.

6 MS. MCKEEVER: Thank you.

7 THE COURT: Thank you.

8 MS. HAGER: Your Honor, I turn the podium over to my  
9 colleague Erica Richards, on the next claims objection with  
10 regard to Moody --

11 THE COURT: Moody, Foster, Assorgi.

12 MS. HAGER: Yes. And Ms. McKeever is also the  
13 attorney of record --

14 THE COURT: Correct.

15 MS. HAGER: -- representing the claimants there.

16 MS. RICHARDS: Good morning, Your Honor. Again, for  
17 the record, Erica Richards, of Morrison & Foerster, appearing  
18 on behalf of the ResCap Borrower Claims Trust.

19 As Ms. Hager noted, the next item on the agenda is  
20 down on page 19, and that is the objection to the proofs of  
21 claim filed by Ruth Assorgi, that was claim number 2580; the  
22 claim filed by John and Elizabeth Foster, that was claim 2581;  
23 and the claim filed by Mark and Cheryl Moody, which was claim  
24 number 2583.

25 The objection was filed in September at docket number

1 5163. And all those claims were included on the same  
2 objection, because they were each filed by Ms. McKeever.

3 I would note, I don't believe she's been admitted pro  
4 hac to represent these claimants. She did not file a response  
5 to the objection. I understand Your Honor's position on the  
6 reply that was submitted to the extent it builds in new legal  
7 arguments.

8 THE COURT: I don't know what you were supplementing,  
9 because there was no response filed to the objection.

10 MS. RICHARDS: Understood, Your Honor.

11 Ms. Delehey submitted a declaration in support of the  
12 initial objection, and she's, as you know, here in the  
13 courtroom today, if you have any questions.

14 I would also like to note for Your Honor, Ms. McKeever  
15 reached out to us late yesterday afternoon and indicated that  
16 she was willing to withdraw the claims. We told her in light  
17 of the fact that it was the eve of the hearing, both we and  
18 presumably your chambers had prepared for it. And under  
19 Bankruptcy Rule 3006, if she wanted to make that request of the  
20 Court she could make it today, but we would be prepared to go  
21 forward with the objection.

22 THE COURT: You want to address that, Ms. McKeever?  
23 So we're dealing with claims 2580, 2581, and 2583.

24 MS. MCKEEVER: Yes, correct, Your Honor.

25 THE COURT: And are you seeking to withdraw the

1 claims?

2 MS. MCKEEVER: Yes, Your Honor.

3 THE COURT: All right, claims are withdrawn. I don't  
4 need to hear the argument then.

5 MS. RICHARDS: Your Honor, can we just clarify that  
6 they are withdrawn with prejudice, and that Ms. McKeever  
7 understands that she can't pursue those claims.

8 THE COURT: We're past the bar date. As far as I'm  
9 concerned, the claims that are withdrawn today are with  
10 prejudice. Submit an order, if you would, indicating that as  
11 stated on the record by the claimant's counsel the claims are  
12 withdrawn.

13 MS. RICHARDS: We will do that.

14 THE COURT: And identifying the claims. Okay?

15 MS. RICHARDS: Thank you, Your Honor.

16 THE COURT: All right. Thank you, Ms. McKeever.

17 MS. RICHARDS: At this point I'll turn the podium over  
18 to --

19 MS. MCKEEVER: Thank you. Your Honor, that's all the  
20 business I have so I'm withdrawing from the CourtCall.

21 THE COURT: Okay, you're excused. Thank you very  
22 much.

23 MS. RICHARDS: Your Honor, I'll turn the podium over  
24 to Mr. Jordan Wishnew.

25 THE COURT: Okay.

1 MR. WISHNEW: Good morning, Your Honor. Jordan  
2 Wishnew of Morrison & Foerster for the ResCap Liquidating --  
3 I'm sorry, Borrower Claims Trust.

4 Skipping ahead, Your Honor, to page 22, item 6, the  
5 debtors' thirty-sixth omnibus objection to claims,  
6 misclassified and wrong debtor borrower claims.

7 There is one contested matter going forward, dealing  
8 with the claim of Ms. Rhonda Deese. I believe she is appearing  
9 telephonically.

10 THE COURT: Ms. Deese, are you on the phone?

11 MS. DEESE: Yes, sir.

12 THE COURT: Okay.

13 MR. WISHNEW: Your Honor, just very quickly. This is  
14 a motion to reclassify and redesignate Ms. Deese's claim, claim  
15 number 4927, filed as an administrative priority claim against  
16 Residential Capital LLC in the base amount of 142,950 dollars  
17 for -- the alleged basis: failure to produce regarding real  
18 estate.

19 So very simply, Your Honor, we are not objecting and  
20 seeking to disallow and expunge the claim through this omnibus  
21 objection. Rather, we are simply asking the Court to  
22 reclassify from an administrative priority claim to a general  
23 unsecured claim, and to redesignate it from Residential Capital  
24 to GMAC Mortgage, since that would be the debtor entity that  
25 she's interacted with.

1 The -- both the --

2 THE COURT: So let me just -- on this point I wanted  
3 to stop and ask you. Here you argue that the claim was filed  
4 against the wrong debtor, but you're agreeing that it will --  
5 that you're prepared to have it as an unsecured claim against  
6 GMACM, right?

7 MR. WISHNEW: Subject -- subject --

8 THE COURT: Subject to whatever objections you may  
9 have down the road.

10 MR. WISHNEW: That's correct.

11 THE COURT: But like on the last case, on Haffey,  
12 where the argument from Ms. Hager was it was filed against the  
13 wrong debtor, there you're not willing to agree that the  
14 claim -- that you're prepared to have it considered as a claim  
15 against the correct debtor?

16 MR. WISHNEW: Well, I think that the --

17 THE COURT: How do you -- this is not the first  
18 time -- it was something that I was thinking about, actually,  
19 this morning, because it's not the first time that this  
20 inconsistency has arisen. Sometimes you're willing to allow a  
21 claim to be basically considered as a claim against the correct  
22 debtor, and other times you argue that no, it should be  
23 expunged because it's a claim against the wrong debtor. How do  
24 you explain that inconsistency?

25 MR. WISHNEW: Sure, absolutely, Your Honor.

1           The distinction between those two situations is that  
2   this was part of a larger omnibus objection, in which we were  
3   basically trying to rebucket claims where we hadn't yet been  
4   able to address the merits of the claims. We wanted to make  
5   sure they were put against the correct parties, so going  
6   forward we knew where the liabilities would ultimately end up  
7   if there was an allowed claim.

8           Whereas, Ms. Hager's objection to --

9           THE COURT: Well, let's -- we'll deal with this one.  
10   It's just I'm noting the inconsistency. Here you're prepared  
11   to have it considered as an unsecured claim against GMACM.

12           MR. WISHNEW: I would say this, Your Honor, going  
13   forward to the extent that there are unresolved borrower  
14   claims, it is not our intention to take this two-step approach  
15   going forward, rather to address claims on their merits through  
16   the objection, as opposed to creating a sort of confusion for  
17   the borrower where we think they might perceive that we're  
18   seeking to disallow their claim, but we're just moving it  
19   around a little bit. So --

20           THE COURT: All right. So just address the issue of  
21   this should be --

22           MR. WISHNEW: Sure.

23           THE COURT: -- reclassified as a general unsecured  
24   claim, rather than an administrative priority claim.

25           MR. WISHNEW: Thank you, Your Honor.



1           So the stated basis for the administrative priority in  
2   Ms. Deese's claim is 503(b)(9). We're not aware of the fact  
3   that she provided any services to the debtors during the  
4   statutory period. And other than that, there really is no  
5   basis in the Bankruptcy Code to afford her any sort of priority  
6   higher than an unsecured claim. So for that reason we would  
7   ask that it be reclassified as an unsecured claim against GMAC  
8   Mortgage, who did have some connection to her loan.

9           THE COURT: All right. Let me -- Ms. Deese, go ahead.

10          MS. DEESE: Yes, Your Honor. It's so complicated I  
11   don't even know where to start here. I have actually spoke  
12   with my local attorney, and he has brought up some words that  
13   are a little alarming to me. And I was actually considering  
14   possibly asking to see if -- he explained to me that he would  
15   be unable to come into the case, and that he is not able to  
16   practice -- that he doesn't have a license in New York. But I  
17   was going to go ahead just turn this over to him. But with  
18   some of the words that he was using I'm starting to feel -- I  
19   was feeling uncomfortable whether I should ask, perhaps, to --  
20   if you would allow me to obtain a New York attorney. There was  
21   words used like an adversary complaint, tainted, false claims.

22          If you'll indulge me, the -- what was explained to me  
23   is that whenever I called this third party -- her name is  
24   Kristine Hannerty (ph.) -- and was asking some questions  
25   regarding the relationship of Residential Capital and GMAC.

1 And she explained that basically that GMAC was the et al., and  
2 that Residential Capital was the parent company. It basically  
3 is --

4 THE COURT: Ms. Deese, let me just stop you there --

5 MS. DEESE: Okay.

6 THE COURT: -- because the debtors' counsel, Mr.  
7 Wishnew, is not proceeding with this objection on the basis  
8 that it named the wrong debtor. So this issue, whether it was  
9 ResCap or GMAC, what the debtors' papers have shown is to the  
10 extent there was a claim it should have been a claim against  
11 GMAC Mortgage, and they're prepared to have it designated as a  
12 claim against GMAC Mortgage.

13 So that issue of -- I think is really no longer an  
14 issue. The real issue before me today is whether this is a  
15 general unsecured claim, or whether it's an administrative  
16 priority claim. I don't know whether that -- so what you were  
17 describing about your conversations with a lawyer seemed to  
18 focus on the entity against which the claim was asserted. And  
19 I think the real issue, for today at least, is whether this is  
20 a general unsecured claim, or whether it's an administrative  
21 priority claim. And that's what you ought to focus your  
22 comments on.

23 MS. DEESE: Okay. Do you have the actual paperwork  
24 that I submitted, there's nine pages that I submitted --

25 THE COURT: I do.

1 MS. DEESE: -- to you?

2 THE COURT: I do.

3 MS. DEESE: Okay. And the bar -- if it's broken down,  
4 and as it was explained to me by another person whenever I  
5 called in, that my concern is that it's -- if they take me from  
6 Residential Capital over to GMAC that the bar date -- I would  
7 be past the bar date. So the argument --

8 THE COURT: No, but they're not asserted -- Ms. Deese,  
9 let me just stop you there. Because -- Mr. Wishnew, you're --

10 MS. DEESE: Okay.

11 THE COURT: -- not asserting that it was a late filed  
12 claim?

13 MR. WISHNEW: No, Your Honor.

14 THE COURT: No. Ms. Deese --

15 MS. DEESE: Okay.

16 THE COURT: -- their agreement basically is, they say  
17 the claim should have been filed against GMACM. They said no,  
18 she filed it against ResCap, but we're prepared to consider it  
19 as a timely claim against GMACM. But the issue -- that's why I  
20 keep coming back to this -- the issue is whether it's a general  
21 unsecured claim or a priority claim. They may come back later  
22 in the case, and object to it even as a general unsecured  
23 claim, but they're not doing that now.

24 What they're saying is okay, we'll permit this to be a  
25 general unsecured claim against GMACM. It was filed against --

1 a claim against ResCap but we're not going to assert that as a  
2 basis for the objection. Okay.

3 So the real issue that they're raising is this issue  
4 of whether it's a general unsecured claim or an administrative  
5 priority claim. Okay.

6 MS. DEESE: If it is -- well --

7 THE COURT: Consider yourself victorious at least to  
8 that extent. Okay.

9 MS. DEESE: Okay. Okay. Well, the reason that I was  
10 requesting the -- or thought that I should be in that position  
11 is that because I submitted a request to produce. Basically,  
12 ownership -- if you read the letter, it breaks it down from  
13 origination to date. Because back from 2005, from the  
14 origination, to about 2012 I have paid perfectly. And I feel  
15 that I have engaged in good faith and -- let's see, and I feel  
16 that their failure to produce -- they failed to produce but yet  
17 they went ahead and assigned it to another -- it was -- they  
18 assigned it to a new assignee. And whenever a note and  
19 mortgage is signed I feel that there's rights and  
20 responsibilities to each other as a bilateral agreement, not  
21 just unilaterally.

22 And what I feel is that whenever I -- I had been  
23 requesting orally of the previous assignors to produce who owns  
24 me, because of documents that I can bring up here, and I need  
25 to clarify the record, coming back to that. But I feel that

1 there's -- not only the right -- what's explained to me, when I  
2 talk to the assignees, is they have the right to the payment,  
3 but they don't have the obligation to produce; that would be  
4 the previous assignor. And so I feel like I'm being ping-  
5 ponged back and forth.

6 I feel that whenever an assignor assigns the note and  
7 mortgage to the assignee and there's a request to produce  
8 ownership on the table, that that obligation should transfer --  
9 that all rights and obligations should transfer to the new  
10 assignee.

11 And just for clarification of the record, there's a  
12 couple of things that is not correct. It's on something that I  
13 pulled up here. It's claim of Rhonda Deese, it's number 34.  
14 There's a couple -- whenever I filed my claim it was on  
15 Residential Capital and GMAC. There was one let -- there was  
16 the first letter that went -- that I sent to -- it's the letter  
17 dated May 25th, that did, indeed -- it was a formal letter that  
18 went to GMAC, requesting ownership, or proof of ownership. But  
19 the subsequent letter, they stated that this went to GMAC, but  
20 it didn't go to GMAC, it actually went to Residential Capital,  
21 et al., so put aka as GMAC. And this went to Residential  
22 Capital per their request of more information. So just to  
23 clarify the record on that.

24 And then, also, under number 37, they're claiming  
25 that -- according to the debtors' books, let's see, that

1 Residential Funding Company, LLC, that they placed me in a  
2 trust RAMP 2005-R57. And I'm looking at the paper that was  
3 sent to me and there is no mention of my being placed in this  
4 RAMP of 2005-R57. It was sent to me; and this was sent by  
5 Ocwen. Hello?

6 THE COURT: All right. Let me ask the debtors'  
7 counsel if he wants to address your concerns. And I certainly  
8 know that you had asked for documentation relating to the  
9 origination of your loan, it's a property in Auburndale,  
10 Florida. And you had asked for a full accounting --

11 MS. DEESE: Yes.

12 THE COURT: -- and some evidence of who owns the loan.  
13 Mr. Wishnew.

14 MR. WISHNEW: Your Honor, I'm not --

15 MS. DEESE: And, sir, may I say one more thing?

16 THE COURT: Let me -- Ms. Deese --

17 MS. DEESE: Okay.

18 THE COURT: -- let me have the debtors' counsel,  
19 Mr. Wishnew, address.

20 MS. DEESE: Okay.

21 MR. WISHNEW: I can't specifically address who or when  
22 GMAC responded to Ms. Deese's request. But what I can say  
23 going forward to try to bring this matter forward, is that my  
24 personal information can be found on our firm's web site.

25 THE COURT: Well, I don't want to get to that.

1 MR. WISHNEW: Okay.

2 THE COURT: It sounds like Ms. Deese has just told me  
3 that she received something from Ocwen showing that the loan  
4 was assigned to a securitization trust. Do you have any  
5 information on that?

6 MR. WISHNEW: Not with me today, Your Honor.

7 THE COURT: Okay. And --

8 MS. DEESE: I can barely hear him. I'm sorry.

9 THE COURT: Okay.

10 MR. WISHNEW: Not with me today, Your Honor.

11 THE COURT: Okay. Here's what -- I'm going to go  
12 ahead and decide the matter, but I'm also going to give you a  
13 direction --

14 MR. WISHNEW: Yes.

15 THE COURT: -- Mr. Wishnew, to try and help Ms. Deese  
16 out on this.

17 MR. WISHNEW: Yes.

18 THE COURT: As you been helpful and done in other  
19 matters, to contact Ocwen.

20 MR. WISHNEW: Yep.

21 THE COURT: I take it Ocwen is now servicing the loan.

22 MR. WISHNEW: That's my understanding, Your Honor.

23 THE COURT: Okay. So first, with respect to the  
24 matter that's pending before me, in the thirty-sixth omnibus  
25 objection, which is at ECF docket 5138, this omnibus objection,

1 the debtor argues the claims are improperly assert -- assert  
2 security interest or priority claims, or they were filed  
3 against the wrong debtor. And the objection today is  
4 proceeding only with respect to claim 4927 filed by Rhonda  
5 Deese, which asserts an administrative priority claim of  
6 142,950 dollars against ResCap. And the debtors are seeking to  
7 modify the claim to a 142,950 general unsecured claim against  
8 GMAC Mortgage, not against ResCap, and reserving all of its  
9 rights to object to the claim as an unsecured claim in the  
10 future.

11 Ms. Deese filed a response to the objection. Her  
12 response is at ECF docket 5492. And she argued that she's  
13 entitled to an administrative priority because the debtors  
14 failed to respond to her request to produce additional  
15 information about the origination and the loan on this  
16 Auburndale, Florida property. And Ms. Deese attached to her  
17 response a letter she sent to GMAC Mortgage requesting the  
18 documentation, as well as her follow-up letter, asking that the  
19 141,950 dollars be forgiven, plus a 1,000-dollar fine. And she  
20 indicated in her letter that she doesn't know who owns or holds  
21 the original note -- the original mortgage and note. Okay.

22 The debtors submitted a reply, which is at ECF 5730,  
23 asserting that Ms. Deese failed to indicate how she's entitled  
24 to an administrative priority under the Bankruptcy Code Section  
25 503(b). And the debtor also stated that according to their



1 books and records, Residential Funding Company owned the loan  
2 before it was put into a securitization trust in 2005.

3 Homecomings, which is one of the debtors, serviced the  
4 loan until July 2009 and then GMAC Mortgage serviced the loan  
5 until it was transferred to Ocwen in February 2013. So Ocwen  
6 is the one that's servicing the loan currently, unless they've  
7 done anything with it, Ms. Deese.

8 MS. DEESE: Um --

9 THE COURT: Let me -- don't interrupt now, okay.

10 MS. DEESE: Okay. Okay, sorry.

11 THE COURT: But to the extent Ms. Deese has a valid  
12 claim it should be asserted against GMAC Mortgage. And the  
13 debtors are willing to have it be considered a claim against  
14 GMAC Mortgage.

15 On the issue of whether it's properly asserted as an  
16 administrative priority claim, no basis for treating the claim  
17 as an administrative priority claim has been set forth. And,  
18 consequently, the debtors' objection to the Deese claim is  
19 sustained to this extent. It's reclassified as a general  
20 unsecured claim against GMAC Mortgage, expunged as a claim  
21 against ResCap. It's reclassified from an administrative  
22 priority claim to a general unsecured claim. That should be in  
23 the order that's submitted to the Court, but not in the  
24 order -- what I'm asking is that you or your colleagues,  
25 Mr. Wishnew, try to help Ms. Deese in getting the information

1 she's been requesting.

2 MR. WISHNEW: Okay.

3 THE COURT: So as you and your colleagues have done in  
4 other instances, contact Ocwen, see if you can get the  
5 information that Ms. Deese has asked for. So Ms. Deese is not  
6 represented by counsel currently, so you or your colleagues are  
7 certainly free to talk to her directly to see if you can be of  
8 assistance.

9 MR. WISHNEW: All right.

10 THE COURT: Do you have her contact information?

11 MR. WISHNEW: Unless it's on the pleadings, I do not.  
12 I will say that my contact information is on our pleadings, our  
13 general office number. So she can reach out and put a call  
14 into me, and I will work with my colleagues to get her the  
15 information.

16 THE COURT: Okay. So I'm going to -- we'll see  
17 whether the debtors' counsel can get you the information you're  
18 looking for, Ms. Deese. But for today at least, the objection  
19 is sustained. The claim is redesignated as a general unsecured  
20 claim against GMAC Mortgage.

21 Okay. Thank you very much, Ms. Deese. You're  
22 excused.

23 Okay. Go ahead, Mr. Wishnew.

24 MS. DEESE: Okay. What is the gentleman's name?

25 MR. WISHNEW: Jordan Wishnew, W-I-S-H-N-E-W.

1 THE COURT: Why don't you tell her your phone number?

2 MR. WISHNEW: Sure. 212-468 --

3 MS. DEESE: 212 --

4 MR. WISHNEW: -- 468 --

5 MS. DEESE: Yes.

6 MR. WISHNEW: -- 8000.

7 MS. DEESE: 000. I'm sorry, can you spell your last  
8 name again, please?

9 MR. WISHNEW: Sure.

10 THE COURT: Slowly.

11 MR. WISHNEW: W-I --

12 MS. DEESE: Um-hum.

13 MR. WISHNEW: -- S, as in Sam, H, as in Harry, N, as  
14 in Nancy, E, as in Eagle, W, as in Water.

15 THE COURT: Okay, Ms. Deese.

16 MS. DEESE: Okay.

17 THE COURT: Mr. Wishnew or --

18 MS. DEESE: Okay.

19 THE COURT: -- one of his colleagues will try and get  
20 the information that you're asking for, okay? Thank you --

21 MS. DEESE: Okay.

22 THE COURT: -- very much.

23 MS. DEESE: Thank you so much.

24 THE COURT: Thank you very much for your  
25 participation.

1 MS. DEESE: Okay.

2 THE COURT: Okay. Mr. Wishnew --

3 MS. DEESE: Thank you.

4 MR. WISHNEW: Thank you, Your Honor.

5 THE COURT: Thank you. All right. You're excused.

6 MS. DEESE: Bye-bye.

7 MR. WISHNEW: Jumping ahead, Your Honor, to item  
8 number 10 on page 27 of today's agenda, the debtors' fifty-  
9 first omnibus objection. There's one contested claim going  
10 forward; that of Jamie and Gary Gindele. I believe Mr. and  
11 Mrs. Gindele is also on the phone today.

12 THE COURT: Mr. and Mrs. Gindele, are you on the  
13 phone?

14 MR. GINDELE: That is correct, Your Honor.

15 THE COURT: Okay. Mr. Wishnew, go ahead.

16 MR. WISHNEW: Thank you, Your Honor. Your Honor, this  
17 is -- relates to the fifty-first omnibus objection, which  
18 sought to disallow and expunge claims on the basis of res  
19 judicata. These are claims that -- where there is a pending  
20 appeal, and we believe that we've made the case in this  
21 instance that the res judicata does apply to this Ohio  
22 foreclosure action, notwithstanding the pendency of an appeal.

23 Recognizing how Your Honor has addressed in prior  
24 instances, we would propose a similar resolution here, which  
25 would be the claim would be disallowed and expunged from the

1 debtors' claims register, notwithstanding, Your Honor, to the  
2 extent you're willing to do so, would modify the automatic stay  
3 to permit the Gindeles' appeal to proceed to a resolution.  
4 Should they succeed in their appeal, they can then move to have  
5 the claim reinstated under Bankruptcy Section 502(j).

6 I think that's a resolution, Your Honor, that benefits  
7 both the debtor and Mr. Gindele, because I can tell from their  
8 pleadings they obviously believe strongly in their appeal. I  
9 think there are issues that should be heard, and the  
10 resolution, as proposed, I think, it would address their  
11 concern and also address the debtors' concern that there not be  
12 a claim outstanding that we think there really is no legal  
13 basis to for allowance.

14 THE COURT: So, Mr. Gindele, what Mr. Wishnew has  
15 proposed is what I've ordered in some other -- at least one  
16 other matter. So as I understand Ohio law, the doctrine of res  
17 judicata applies even if an appeal is pending, which is the  
18 circumstance here. And what I've done before is, as I think  
19 I'm required to do, apply res judicata, expunge the claim on  
20 that basis, but permit -- it's called lifting the stay to  
21 permit your appeal in Ohio to go forward.

22 If you're successful, you can seek to come back here  
23 and have your claim reinstated. So there's some prior history,  
24 as Mr. Wishnew indicated, because I ordered exactly that in  
25 another matter where this res judicata issue was involved. But

1 I'll hear you if you want to argue, Mr. Gindele.

2 MR. GINDELE: Well, I appreciate that, Your Honor, and  
3 I certainly appreciate the fact, in attempting to respond this  
4 101-page brief that showed up in my e-mail at 10 o'clock on  
5 Monday night, that you allowed us to view a 3-page reply  
6 yesterday to at least attempt to put a stake in the ground on  
7 this. Obviously, the borrowed claims trust counsel has  
8 eloquently positioned their res judicata argument for your  
9 consideration. And as you've stated, you've considered these  
10 issues like this before. We contend that the res judicata  
11 argument is without merit.

12 It's irrelevant and moot. While attempting to, I  
13 guess, articulate a narrative that shifts the focus of the  
14 Court away from the true nature of our claims, the secondary  
15 argument of res judicata, in our opinion, fails to dispense  
16 with either of the primary issues that remain. First, the  
17 facts aren't that the claimants are simply attempting to  
18 relitigate the same claims, as the case in Hamilton County.  
19 Our issue is one of court's jurisdiction and Residential  
20 Capital, et al. lack of standing to invoke the authority of the  
21 court in Hamilton County.

22 THE COURT: So the court in Hamilton County, Mr.  
23 Gindele, found that the plaintiff in the case had standing  
24 because it held -- it was -- it held the note, the actual --  
25 the original note endorsed and blank. I believe that's

1 referenced in the court's -- the Ohio Court's decision. And  
2 ordinarily, delivery of the original note endorsed and blank is  
3 sufficient to establish standing of the party. Beyond that,  
4 it's what the Ohio Court held and entered judgment on. What  
5 res judicata does is prevents this Court from reviewing a  
6 judgment of the Ohio Court. The res judicata rule in Ohio  
7 doesn't require that there be no appeals pending. Res judicata  
8 applies in Ohio even where it's simply a judgment entered by a  
9 trial court even where there's an appeal.

10 So the issue you're trying to raise, and I understand  
11 that you're arguing that the Ohio Court didn't have  
12 jurisdiction to do what it did, it found that it did. The  
13 place to raise that issue is on appeal, if that's what you  
14 choose to do. But I don't get to second-guess the decision of  
15 the Ohio Court. That's the fundamental problem you have that's  
16 before me.

17 Go ahead and respond to that.

18 MR. GINDELE: Yes. The matter of jurisdiction is the  
19 subject of the appeal currently stayed in the First District  
20 Court of Appeals based on the debtors' request. What has  
21 complicated the issue is subsequent to that and due to the sale  
22 of a portfolio of assets to Berkshire Hathaway and the transfer  
23 of servicing to Ocwen, now, we have a new owner according to  
24 the court plan. And that new owner is 21st Mortgage  
25 Corporation. 21st Mortgage Corporation, being represented by a

1 different law firm, has come into appeals court and issued a  
2 request to be substituted as plaintiff.

3 Well, we don't have an issue with 21st Mortgage  
4 Corporation. Our issue is with Residential Capital, et al. It  
5 always has been, and it continues to be so today. I mean, even  
6 in the massive documents and so forth that the borrowed claims  
7 trust counsel prepared and entered for your consideration, it  
8 includes a letter from the vice president at GreenPoint  
9 authenticated via Jamie Gindele's uncontradicted (sic)  
10 affidavit that clearly states that the note was not negotiated  
11 by or transferred by GreenPoint to Residential Capital. That  
12 letter was six months after Residential Capital alleges the  
13 initiation of their chain of custody.

14 So I realize that that is an issue that we'll be  
15 dealing with in the appeals court. But people -- the --  
16 there's question as to why we're concerned about this  
17 substitution of counsel and this transfer of ownership and so  
18 forth, it's because our real issue -- our real beef isn't with  
19 this subsequent holder, because our point is that the  
20 subsequent -- you can't hand something over to somebody that  
21 you don't have. Jurisdiction trumps res judicata. You can't  
22 get to res judicata without first establishing jurisdiction.

23 THE COURT: All right. Mr. Gindele --

24 MR. GINDELE: Second --

25 THE COURT: Mr. Gindele.



1 MR. GINDELE: I'm sorry.

2 THE COURT: You're going to have --

3 MR. GINDELE: Yes.

4 THE COURT: You're going to have to take that issue up  
5 with the Ohio Court on appeal, not with me. The Ohio Court  
6 entered a judgment. The judgment, at this point, stands. The  
7 debtor is seeking to apply res judicata as to it, and you'll  
8 have your opportunity to argue the issue in the Ohio Court.

9 All right. I'm prepared to rule now. This is respect  
10 to the fifty-first omnibus objection, which is at ECF 5646.  
11 And the omnibus objection is proceeding only as to claims 5422  
12 and 5431 filed by Jamie Gindele. And the debtor asserts that  
13 the Gindele claims are barred by res judicata arising from  
14 litigation in Ohio State Court. The Gindele -- Mr. Gindele's  
15 proofs of claim are identical in substance, except one proof of  
16 claim relates to RFC and one relates to Residential Funding  
17 Real Estate Holdings, LLC.

18 MR. GINDELE: That's --

19 THE COURT: In --

20 MR. GINDELE: That's correct. It's in the transfer of  
21 the assignment --

22 THE COURT: All right.

23 MR. GINDELE: -- is -- alleged assignment Your --

24 THE COURT: Please don't interrupt.

25 MR. GINDELE: -- Honor suggests.

1 THE COURT: In the proof of claims, the Gindeles  
2 assert that the debtor has liability for claiming an interest  
3 in a fraudulently obtained note through a MERS assignment and  
4 the claim attached filings from the Ohio foreclosure proceeding  
5 initiated by Residential Funding, LLC.

6 With respect to the underlying case in Ohio, the  
7 debtors argue that the Ohio State Court action, forming the  
8 basis for Gindeles' claims, was dismissed with prejudice as to  
9 the debtors and even though an appeal was filed, the pendency  
10 of an appeal does not affect the preclusive effect of a  
11 judgment on the merits. See Cully V. Lutheran Medical Center,  
12 243 N.E.2d 531 at 532, Ohio Court of Appeal, 1987 (per curiam)  
13 (applying Ohio law to explain that "the pendency of an appeal  
14 does not prevent the judgment's effect as res judicata in a  
15 subsequent action.").

16 The Gindele loan went into default in August of 2008.  
17 A modification agreement was reached -- a loan modification was  
18 reached with RFC, but Gindele defaulted on their loan  
19 modification agreement as well. The foreclosure action was  
20 commenced in Ohio court in June 2009 and answered -- Gindele  
21 filed an answer containing several defenses and counterclaims.  
22 And in January 2010, the mortgage and note were assigned back  
23 to RFC, and RFC then substituted as the plaintiff in the  
24 foreclosure action.

25 In February 2012, a magistrate judge presiding over

1 the foreclosure proceedings granted summary judgment in favor  
2 of RFC. And the Court's order provided that unless the  
3 Gindeles paid the amount due to RFC within three days of entry  
4 of the order, the home would be foreclosed and an order of sale  
5 would be issued to the county sheriff. Nearly one month later,  
6 Gindele filed an objection to that court order, and RFC filed a  
7 response. In May 2012, the Ohio Court of Common Pleas entered  
8 a decision affirming and adopting the magistrate judge's order,  
9 and judgment decree and foreclosure was entered in the Ohio  
10 Court on June 8th, 2012.

11 Gindele filed a notice of appeal on June 25th, 2012,  
12 and the appeal is currently stayed, although the debtor  
13 acknowledges that certain claims within the appeal are  
14 permitted to proceed under the Court's supplemental servicing  
15 order that was entered in this case. In February 2012,  
16 Berkshire Hathaway bought the Gindele loan from RFC, and 21st  
17 Century Mortgage acts as the servicer. And 21st Century has  
18 now been substituted as a plaintiff appellee in place of RFC in  
19 the Gindeles' appeal, although Gindele filed an opposition to  
20 that substitution in December 2013. And the appellate court  
21 hasn't ruled on the substitution yet.

22 So with respect to the issue of res judicata, since  
23 the underlying ruling was in Ohio State Court, this Court  
24 applies Ohio State law in res judicata. See New York v. Sokol,  
25 In Re: Sokol 113 F.3d 3003 at 3004, Second Circuit 1997. Ohio

1 courts have explained that res judicata encompasses both claim  
2 preclusion and issue preclusion. See O'Nesti v. DeBartolo  
3 Realty Corp., 862 N.E.2d 803 at 806, Ohio 2007. "The doctrine  
4 of res judicata encompasses the two related concepts of claim  
5 preclusion, also known as res judicata or estoppel by judgment,  
6 and issue preclusion, also known as collateral estoppel."

7 The debtors argue that claim preclusion applies here,  
8 and the Ohio courts require satisfaction of four criteria to  
9 apply claim preclusion. One, an earlier valid judgment on the  
10 merits; two, a second action involving the same parties or  
11 their privies; three, the second action raises claims that were  
12 or could have been litigated in the first action; and four, the  
13 second action arises out of the same transaction or occurrences  
14 the first action. See Hapgood v. City of Warren, 127 F.3d 490  
15 at 493, Sixth Circuit 1997.

16 The debtors argue that all four prongs are satisfied  
17 here because the Ohio Court of Common Pleas' judgment on the  
18 merits involving the same parties and same claims arising from  
19 the same transaction or occurrence. In fact, the debtors argue  
20 that both the order affirming and adopting the magistrate  
21 judge's summary judgment order and the judgment and decree and  
22 foreclosure constitute final judgments on the merits. In  
23 addition to Hapgood, see Butts v. Deutsche National Trust Co.,  
24 2013 U.S. District Lexus 157852 at Star 10 Northern District of  
25 Ohio, November 10th, 2013. The pendency of Gindeles' appeal

1 does not alter the preclusive effect of the Ohio judgments.  
2 See Hapgood 127 F.3d at 293, note 3 ("The pendency of an  
3 appeal, however, does not prohibit application of claim  
4 preclusion.")

5 As for Gindeles' argument the Ohio Court lacked  
6 jurisdiction and/or judgments after the petition date, the  
7 debtors argue that the Court's interim servicing order entered  
8 two days after the petition date allowed the debtors to  
9 continue foreclosure proceedings and granted limited stay  
10 relief to borrowers so they could assert counterclaims in the  
11 foreclosure proceedings.

12 Based on the foregoing, the Court sustains the  
13 debtors' objection and sustains and expunges the Gindele claims  
14 number 5422 and 5431 on the basis of res judicata. And as I've  
15 done in prior matters, I will also -- the order, Mr. Wishnew,  
16 as you indicated, should provide that the stay is lifted to  
17 permit the Gindele appeal to go forward in the Sixth Circuit.  
18 So that'll be the disposition, so the order should just simply  
19 say for the reasons stated on the record during the hearing,  
20 the objection is sustained with the effect that I've described.

21 All right. Thank you very much, Mr. Gindele.

22 MR. GINDELE: Thank you.

23 THE COURT: Mr. Wishnew, what's next?

24 MR. WISHNEW: Thank you, Your Honor. The last matter  
25 going forward on today's calendar is item 13 on page 28.

1 The -- at this point, this an uncontested omnibus objection,  
2 where the debtors seek three forms of relief. I'll just note  
3 that these deal with nonborrower claims. We seek to  
4 redesignate, reclassify, reduce and allow certain claims,  
5 reclassify claims and redesignate and allow claims and also  
6 redesignate, reduce and allow other claims.

7 There was one response received by the McDowell Riga  
8 Posternock firm. We were able to consensually resolve that.  
9 We have modified the exhibits of the form of order and shared  
10 it with them. They've -- are okay with that. So if it would  
11 please the Court, we can submit our bias form of order to you  
12 after the hearing.

13 THE COURT: All right. So what's before me is the  
14 fifty-seventh omnibus objection of nonborrower claims; it's at  
15 ECF docket number 6108. In that omnibus objection, the debtor  
16 seeks the relief that Mr. Wishnew described on the record. No  
17 responses were filed. Mr. Wishnew has indicated the  
18 disposition, with respect to one, Mr. Wishnew, there was an  
19 informal response. The debtors' objection is sustained, and  
20 you can submit the revised order to the Court.

21 MR. WISHNEW: Very good, Your Honor. That would  
22 conclude this morning's calendar, and I will see you at  
23 2 o'clock, Your Honor.

24 THE COURT: Okay.

25 MR. WISHNEW: Thank you very much.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 12:11 PM)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

E X H I B I T S

DEBTORS'	DESCRIPTION	PAGE
	Declaration of Pamela West,	14
	docket #5228	
	Declaration of John Dempsey,	14
	docket #5229	
	Declaration of William Nolan,	14
	docket #5230	

RULINGS

	Page	Line
Fourth Fee Application of KPMG LLP for	10	12
Interim Allowance and Compensation for		
Professional Services Rendered and		
Reimbursement of Actual and Necessary		
Expenses Incurred from May 1, 2013 through		
August 31, 2013, approved.		



1			
2	RULINGS (cont'd.)		
3		Page	Line
4	Debtors' Motion for Entry of an Order	11	24
5	(I) Authorizing the Debtors to Compensate		
6	PricewaterhouseCoopers, LLP for Foreclosure		
7	Review Services in Furtherance of the		
8	Debtors' Compliance Obligations Under		
9	Federal Reserve Board Consent Order and		
10	(II) Reaffirming Relief Granting in the GA		
11	Servicing Order, approved.		
12	Debtors' Application for an Order	11	24
13	Authorizing the Debtors to Employ and		
14	Retain Pepper Hamilton LLP as Special		
15	Foreclosure Review Counsel for Bankruptcy		
16	Issues to the Debtors, Nunc Pro Tunc to May		
17	14, 2012 [Docket No. 1426], approved.		
18	Debtors' Application for Authorization to	11	24
19	Employ and Retain Hudson Cook, LLP as		
20	Special Counsel to the Debtors, Nunc Pro		
21	Tunc to May 14, 2012 [Docket No. 1427],		
22	approved.		
23			
24			
25			

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

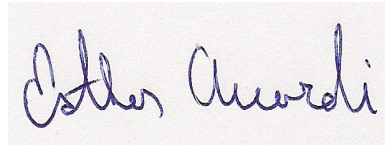
RULINGS (cont'd.)

	Page	Line
Claims of Assorgi, Foster and Moody are	69	9
withdrawn with prejudice.		
Debtors' Thirty-Sixth Omnibus Objection to	81	19
Claims, sustained. Claim expunged as a		
claim against ResCap, and redesignated		
as a general unsecured claim against GMAC		
Mortgage.		
Debtors' Fifty-First Omnibus Objection to	93	12
Claims, sustained and Gindele claims		
expunged.		
Debtors' Fifty-Seventh Omnibus Objection to	94	19
Claims, sustained.		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.



---

ESTHER ACCARDI

AAERT Certified Electronic Transcriber CET\*\*D-485

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: January 31, 2014